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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 24 /

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA AND ARKANSAS RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

BRIEF ON BEHALF OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, BURLINGTON-ROCK ISLAND RAILROAD COMPANY, GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PANHANDLE AND SANTA FE RAILWAY COMPANY, AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

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This brief is filed on behalf of the above-named appellees, who were interveners in the court below, in support of the Commission's orders under attack, and parties to the proceedings before the Interstate Commerce

Commission known as Docket 12798, *Galveston Commercial Association* v. *Galveston, Harrisburg & San Antonio Railway Company, et al.*, and Docket 20685, *The Cooper Grocery Company, et al.* v. *Angelina & Neches River Railroad Company, et al.*

All of these appellees either directly or through subsidiary railroad corporations have lines of railroad to one or more of the Texas ports of Galveston, Houston, Texas City, and Beaumont, and have a vital interest in this proceeding.

The issues before this court will be very concisely stated by these appellees, because the statement of facts and descriptions of the various proceedings before the Interstate Commerce Commission and the lower court, are sufficiently set forth in the various briefs of appellants.

Plaintiffs below, and appellants here, challenge the legality of orders of Division 2 of the Interstate Commerce Commission of June 24, 1925, and of the Interstate Commerce Commission of June 29, 1927, finding that the maintenance by defendant carriers before the Commission of the same rates to New Orleans as to Galveston and other Texas ports taking the same rates on export, import, and coastwise traffic to and from the territory described in such report, resulted in undue preference to New Orleans and undue prejudice to Galveston and the other Texas ports, and that such undue prejudice should be removed by establishing from and to interior points from which the short line distances to New Orleans do not exceed those to Galveston by more than approximately 25 per cent rates to or from Galveston and other Texas ports taking the same rates, as the case may be, which do not exceed the contemporaneous rates on the same commodities to or from New Orleans; and by establishing from or to interior points

from which the short line distances to New Orleans exceed those to Galveston by more than 25 per cent, rates to or from Galveston and the other Texas ports taking the same rates, which do not exceed rates which are less than the contemporaneous rates on the same commodities to or from New Orleans by the differentials prescribed in such orders.[1]

In the order of the Commission of June 29, 1927, the Texas and Pacific Railway Company and the Louisiana Railway & Navigation Company and the Louisiana Rail-

1. Grain and grain products from Kansas on, south, and east of the line of the Rock Island from and including Liberal to but not including Hutchinson, and from Oklahoma and Texas on and north of the lines of the Rock Island and the Chicago, Rock Island & Gulf, hereinafter collectively or separately referred to as the Rock Island, from and including Oklahoma City through Clinton, Okla., and Amarillo, Tex., to the Texas-New Mexico State line, 1 cent; from Oklahoma and Texas south of the Rock Island lines just described, 2 cents.

Asphalt from southern Kansas north of the Rock Island line above described, 1 cent; from Kansas, Oklahoma, and Texas on and south of that line and on and north of the Rock Island lines in Oklahoma and Texas above described, 2 cents; from Oklahoma and Texas south of those lines, except the Houston-Beaumont-Port Arthur groups, 3 cents; from the Beaumont-Port Arthur group, 6 cents.

Bagging (cotton-bale covering), cotton-bale ties, and buckles, to Oklahoma and Texas on and north of the aforesaid Rock Island lines, 3 cents; to Oklahoma and Texas south of those lines, 6 cents; to southwestern Louisiana, 5 cents.

Bags (burlap, jute, gunny, cotton, clayed cotton, and cotton lined) and related articles to Oklahoma on and north of the aforesaid Rock Island lines to the Oklahoma-Texas State line, 3 cents; to Oklahoma south of that line, 6 cents; to southwestern Louisiana, 5 cents.

Green coffee to Texas, 9 cents.

Cotton-factory products and related articles from Texas, 12 cents.

Cottonseed and peanut cake and meal from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 3 cents; from Oklahoma and Texas south of those lines, 5 cents.

Cottonseed and peanut oil from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 4 cents; from Oklahoma and Texas south of those lines, 6 cents.

Lumber and forest products taking the same rates from southwestern Louisiana, 2 cents.

Packing-house products and related articles, except soap, from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 5 cents; from Oklahoma and Texas south of those lines, 8 cents.

Rice and rice products from southwestern Louisiana, 3 cents.

Rosin from southwestern Louisiana, 2 cents.

Soap from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 4 cents; from Oklahoma and Texas south of those lines, 6 cents.

Turpentine and related articles from southwestern Louisiana, 3 cents; from Texas, 6 cents.

way & Navigation Company of Texas were excluded from the preference and prejudice order, but in its report on further consideration of December 23, 1929, the Commission reversed its former findings as to the above companies and held that the Texas and Pacific and Louisiana Railway & Navigation companies were properly amenable to a finding of preference to New Orleans and prejudice of other Texas ports, and required that such preference and prejudice be removed as required of the other defendants in its order of June 29, 1927.

While appellants challenge the orders of the Commission as being not supported by the evidence of record, it should be pointed out that on page 44 of the brief of appellant, Texas and Pacific Railway Company, and on page 55 of the brief of the New Orleans Joint Traffic Bureau, statements are made that this is in no sense of the word a fact case. In the Texas and Pacific brief it is stated:

> "* * * we do not ask or expect this Court to weigh or pass upon the merits of conflicting evidence nor to substitute its judgment as to evidentiary facts for that of the Commission."

In the New Orleans Joint Traffic Bureau brief it is stated:

> "We are not asking that the Court explore in detail the voluminous record in the case at bar and then exercise its independent judgment as to whether or not there is some evidence which supports the findings of the Commission."

The findings of the Commission are supported by substantial evidence of record. The respective distances between the origin and destination territory involved and New Orleans, on the one hand, and Galveston, on the other, are in the 1927 report of the Commission stated to be as follows (Rec., 3376-7):

> "From southern Kansas to New Orleans 898 miles, to Galveston 755 miles, difference 143 miles; exclud-

ing points in equalized territory, 930 and 768 miles, respectively, difference 162 miles.

From Oklahoma to New Orleans 691 miles, to Galveston 545 miles, difference 146 miles; excluding points in equalized territory, 720 and 546 miles, respectively, difference 174 miles.

From northern Texas to New Orleans 644 miles, to Galveston 444 miles, difference 200 miles; excluding points in equalized territory, 670 and 457 miles, difference 213 miles."

As to the injury resulting to Galveston from the prior existing equalized rate structure, see the testimony of witnesses Thornton (Rec., 289-293); Eargle (Rec., 2066-7); Davison (Rec., 2081-5); and Hershey (Rec., 2275-2285).

However, notwithstanding the declarations above referred to of appellants, that this case is not essentially a fact case, yet with the exception of the argument that the Texas & Pacific and Louisiana Railway & Navigation Companies cannot as a matter of law be guilty of the prejudice and preference found and a few other minor contentions, the entire case presented by appellants constitutes a plea to this court to examine independently the voluminous evidence of record, weigh the conflicting testimony appearing therein and thereafter substitute its own independent judgment as to the weight of such testimony, and to substitute its judgment upon the facts found for that of the Commission. The entire Tenth Proposition dealt with at pages 149 to 223 of the Texas & Pacific brief constitutes an appeal to this court to examine the evidence of record and exercise its independent judgment thereon. In the Fourteenth Proposition of the same brief the district court below is taken to task for its failure to analyze the evidence before the Commission and exercise its judgment thereon.

It is, of course, elementary that where there is substantial evidence of record in support of the findings of the Interstate Commerce Commission, neither a district

court nor this court will independently examine such evidence and substitute its judgment for that of the Interstate Commerce Commission as to the proper weight to be accorded thereto.

There is also involved in this appeal the order of the Interstate Commerce Commission entered in Docket 20685, *The Cooper Grocery Company et al.* v. *Angelina & Neches River Railroad Company et al.* In that proceeding the Commission found in its report of December 23, 1929 (Rec., 3438), that the rate on green coffee, in carloads, from New Orleans to Waco, Texas, was not unreasonable, but that it was and for the future would be unduly prejudicial to complainants at Waco and unduly preferential of their competitors at Dallas and Fort Worth, Texas, to the extent that it exceeded or would exceed the rate contemporaneously applied on the same commodity from New Orleans to Dallas and Fort Worth. The carriers defendant in that proceeding participated in joint through rates from New Orleans to all of the points involved, Dallas, Fort Worth and Waco, and under the principles hereinafter discussed are properly subject to a finding of prejudice and preference. The issues in that case are exactly similar to and are fully covered in the argument concerning the orders in the main case, Docket 12798, *Galveston Commercial Association* v. *Galveston, Harrisburg & San Antonio Railway Company et al.*

SUMMARY OF ARGUMENT.

I.

The existence of prejudice or preference is one of fact to be determined by the Interstate Commerce Commission.

II.

The finding of the Interstate Commerce Commission as to the existence of prejudice or preference, supported by substantial evidence, is not subject to review in the courts.

III.

A discrimination may be unlawful and unjust when measured by the transportation standard, and condemned by the Commission, although the prejudicial and preferential rates be the same in cents per hundred pounds.

IV.

The Texas & Pacific and Louisiana Railway & Navigation Companies serving directly the preferred port New Orleans and participating in joint through rates to the prejudiced Texas ports are properly subject to the finding of prejudice and preference made by the Interstate Commerce Commission.

V.

The contention that the Commission failed to give any consideration to the competitive character of the export, import and coastwise traffic involved in this proceeding is without merit.

VI.

The orders of the Interstate Commerce Commission involved in this proceeding do not unlawfully interfere in the managerial discretion of the Texas & Pacific Railway Company nor deprive that company of due process of law contrary to the Fifth Amendment to the Constitution of the United States.

VII.

The orders of the Commission under attack in this proceeding were not orders designed to regulate industry. They constitute a proper exercise of the Commission's jurisdiction to regulate rates and charges of carriers and are founded solely on transportation conditions.

VIII.

The action of the Interstate Commerce Commission in granting fourth section relief constitutes no precedent to guide its actions here. In so far as fourth section relief to circuitous lines to meet the competition of short lines is concerned, the situation is in no sense analogous; and in any case where fourth section relief is granted it must be upon a finding by the Commission upon the facts before it that Section 3 of the Interstate Commerce Act is not violated.

IX.

The orders of the Commission herein do not constitute a preference of the ports of one state over those of another contrary to Section 9 of Article I of the Constitution of the United States.

ARGUMENT.

I.

THE EXISTENCE OF PREJUDICE OR PREFERENCE IS ONE OF FACT TO BE DETERMINED BY THE INTERSTATE COMMERCE COMMISSION.

The question of the existence of prejudice or preference arising out of a given rate adjustment is one of fact to be determined by the Commission. In *C. N. O. & T. P. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184, at page 194, the court said:

> "It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

In *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, at page 238, it is stated:

> "The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence. * * *"

In *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, the court, at page 170, lays down the same rule in the following language:

> "As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section,

> shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case."

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, the court, at page 361, in referring to Section 3 of the Interstate Commerce Act, states:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact."

In the proceedings before the Commission it determined from the evidence before it that the port equalization practiced by the carriers constituted prejudice to the Texas ports and preference of New Orleans, and as will be hereafter discussed that finding of fact is not subject to review in the courts.

II.

THE FINDING OF THE INTERSTATE COMMERCE COMMISSION AS TO THE EXISTENCE OF PREJUDICE OR PREFERENCE, SUPPORTED BY SUBSTANTIAL EVIDENCE, IS NOT SUBJECT TO REVIEW IN THE COURTS.

The finding of preference to New Orleans and prejudice to the Texas ports is supported by substantial testimony of witnesses for complainants before the Com-

mission and interveners supporting them, that the practice of the carriers in maintaining a parity of export, import, and coastwise rates as between New Orleans and the Texas ports, notwithstanding the materially greater transportation service involved in the transportation to or from New Orleans, made it extremely difficult for the Texas ports to compete with New Orleans. Being supported by the evidence referred to, the finding of the Commission as to the fact of prejudice and preference can not be reviewed in the courts. Appellants in this proceeding, in effect, seek a review of that evidence and the substitution of the judgment of the court for that of the Commission as to the weight of such evidence. The finding of the Commission, however, upon the fact of prejudice or preference, supported by substantial evidence, is final and conclusive. With regard to the power of the courts to review administrative findings of the Commission, this court in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, said at page 547:

> "It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Western Paper Makers' Chemical Co. et al.* v. *United States, et al.*, 271 U. S. 268, at page 271, the court said:

> "The determination whether a rate is unreason-

able or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. * * * To consider the weight of the evidence is beyond our province."

This doctrine was again announced in *Virginian Railway* v. *United States*, 272 U. S. 658, where upon page 663 it was said:

"The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers Chemical Co.* v. *United States*, 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested."

Further at page 665 of the same opinion the following language appears:

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

III.

A DISCRIMINATION MAY BE UNLAWFUL AND UNJUST WHEN MEASURED BY THE TRANSPORTATION STANDARD, AND CONDEMNED BY THE COMMISSION, ALTHOUGH THE PREJUDICIAL AND PREFERENTIAL RATES BE THE SAME IN CENTS PER HUNDRED POUNDS.

The contention appears throughout the briefs of appellants that preference and prejudice can not be found to exist in a situation where the rates to New Orleans are maintained merely on a parity with those to the Texas ports, regardless of the difference in distance, and that an actual difference in the rates in cents per hundred pounds must exist before Section 3 can be violated. This contention is stated in the following language at page 123 of the Texas & Pacific brief:

> "It is highly significant, we believe, if we may here insinuate a parenthetical comment, that it is tacitly assumed by the Court that any infraction of the terms of Section 3 calls for at least a *difference* in rates as a starting point, and even with that to begin with other facts must be established to prove that the discrimination is unjust."

As heretofore pointed out, the finding of prejudice and preference is a matter of fact to be found by the Commission, and this finding of fact where the prejudicial and the preferential rates are the same has ample support in the decisions of the Commission and of the courts and in sound logic.

Section 3 of the Interstate Commerce Act declares:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corpora-

tion, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Under such a theory preference or advantage, or prejudice or disadvantage, could exist only where the rates considered were different in cents per 100 pounds. Such a theory would mean that the mandate thus placed upon the carrier as to equality of treatment of places, persons, and localities would be satisfied merely by equality in the amount of the charge, together with a complete disregard of the service performed for that charge. Equality or parity in the measure of the charge for the service performed would be wholly irrelevant and immaterial.

Such a doctrine necessarily leads to absurd results. If, as in this case, the requirements of Section 3 are satisfied so long as traffic to or from one port is charged no higher in cents per 100 pounds than to or from another port, for distances 200 miles and greater, neither could preference nor prejudice result from the charging of the same rate in cents per 100 pounds on traffic to one point for a haul of 100 miles as was charged to another point for a haul of 2,000 miles. While the case just instanced might be extreme, nevertheless if the doctrine is true as to the 200 mile difference in haul it would be equally logical in the case of the 2,000 mile haul. Under such a theory all economic advantage of geographical location would be swept away. The Commission and the courts, however, have considered this theory and have rejected it.

Under the theory of the Texas & Pacific, a passenger paying as fare from a nearby point in Mississippi to New Orleans the same identical amount in dollars and cents as another passenger paid as fare from New York to New Orleans, would have no complaint. There would be equality or parity as the Texas & Pacific understands it,—not, however, as those terms have been construed

and applied by the Interstate Commerce Commission and the courts.

The answer of the Commission to this contention when put forth by the Texas & Pacific in argument before it is contained in its second report, 128 I. C. C. at page 379, where it says:

> "This carrier contends that an equality in rates such as that here complained of can not be unduly prejudicial. The cases which it cites do not support this view of the law. It is a familiar principle that each community is entitled to the benefits arising from its natural advantages."

The Commission's finding as to the existence of prejudice and preference is further supported in its finding on page 384 of its report on rehearing, 128 I. C. C. 349, that transportation conditions throughout the territory involved were substantially the same and that therefore the transportation cost to and from the respective ports would be approximately upon the same level. That finding is as follows:

> "No witness seriously questioned the finding, first made in *Memphis-Southwestern Investigation,* 55 I. C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same. The transportation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to. With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers. We say approximate because the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf make impossible, of course, an equality of unit cost on every commodity."

It should further be pointed out that no party to this proceeding seriously questions the above finding. It is true the Texas & Pacific and other parties make some claim as to lessor costs upon traffic to or from New Orleans when such traffic is not charged its proper proportion of total cost but considered wholly as added traffic. However, as heretofore pointed out, the natural desire of a railroad to increase its business does not justify a violation of Section 3, and further, the evidence of the Texas & Pacific upon such point was wholly defective, as will be pointed out later, and was properly rejected by the Commission.

Under the circumstances above described the Texas ports are entitled in their competition with New Orleans to rates based upon an equality of service in the transportation to and from such respective ports. And such equality is not accorded by rates equal merely in cents per 100 pounds. This doctrine was announced by the Commission in *Elk Cement & Lime Company et al.* v. *B. & O. R. R. Co. et al.*, 22 I. C. C. 84, in which case cement mills located in Michigan complained that rates maintained by defendants from cement mills in the Lehigh Valley in Pennsylvania to destinations in Central Freight Association territory preferred such Pennsylvania mills and prejudiced themselves. As shown on pages 87 and 88 of the Commission's report, rates from a representative Michigan cement mill to the destinations involved ranged from 6½ cents for a haul of 216 miles to 11½ cents for a haul of 434 miles, while rates from a representative mill at Coplay, Pa., to the same destinations ranged from 11.25 cents for a haul of 659 miles to 17.9 cents for a haul of 1013 miles. It should be noted that the rates from the alleged prejudiced points were substantially less than from the alleged preferred mills in Pennsylvania. In that case the defendants made the same contention as here made by appellants and the

Commission in no uncertain terms rejected such contention. Referring to the contention of the defendants the Commission states on page 88:

> "It was their contention in brief and on argument that no discrimination could be predicated on rates from the mills of complainant to Detroit and other points in central freight association territory, because in every instance there is a higher aggregate charge from the Lehigh Valley district. With this contention we can not agree. If the contention of the defendants is the law, then followed to its logical conclusion carriers would have the right to completely nullify distance and give shippers far removed from consuming markets absolute control of prices in such markets as against shippers located near thereto. Indeed, it is charged by the complainants in this case that when Lehigh Valley district shippers have supplied the eastern markets they 'dump' their surplus in Detroit and other central freight association points at less than cost of manufacture and make prices so low that the business is no longer profitable. It appears to be the practice of all cement producers to 'dump' their surplus product in certain large competitive consuming markets, but the complainants assert that when they undertake to rid themselves of their surplus they are confined in their markets and are compelled to ship under rates of freight which are much higher than those enjoyed by their competitors. From the figures given herein it is clearly apparent that the Michigan cement manufacturer can not ship to the east for any great distance, nor can he do so to most points in central freight association territory except he meets the competition from the Lehigh Valley district shippers. In so far as the carriers which make joint through rates to Detroit and other consuming points also make rates from the Lehigh Valley district mills to competitive central freight association points, they unduly discriminate against the Michigan producers and relatively they are at a disadvantage."

The Commission found that the discrimination against the Michigan mills was represented by the difference be-

tween the rates charged them and the Lehigh Valley district shippers for relative distances and directed defendants to publish rates which would remove such discrimination.

A recent case in which a complainant paid actually lower aggregate charges per 100 pounds was found to be prejudiced by rates higher in cents per 100 pounds, but relatively lower, service considered, is *American Distilling Company* v. *A. C. & Y. Ry. Co. et al.*, 160 I. C. C. 366, 153 I. C. C. 717, 140 I. C. C. 633. In that case, which dealt with rates upon denatured alcohol from Pekin, Ill., and New Orleans, La., to destinations in central territory, the existing rates from Pekin to the destinations involved were lower in cents per 100 pounds than from New Orleans. Prejudice was found to exist, however, and it was ordered removed by the observance of differences in rates from Pekin less than those from New Orleans to specified points in central territory as shown by specific amounts in an appendix to the second supplemental report of the Commission in 160 I. C. C

A similar contention to that made here was made before the Commission in *Southern Kansas Grain & Grain Products Association* v. *C. R. I. & P. Ry. Co. et al.*, 139 I. C. C. 641. In that case the complainant alleged undue prejudice and preference arising out of the action of the carriers in permitting at Kansas City transit on grain and grain products without out-of-line charge where the routes from origin to final destination of such commodities through Kansas City were materially longer than routes through Wichita. At page 670 the Commission stated:

> "Counsel for the opposing interveners urges, on brief, that while there might be unusual circumstances under which a finding of undue prejudice could be made in a situation where a complaining community enjoys a parity of rates with its alleged preferred competitor, no such finding could be made

> in this case because complainants have failed to prove as a fact that they have actually lost business as a result of the practices assailed. Conceding this failure of proof it is not believed that this position can be sustained. A marked geographic advantage suggests something better than a rate parity."

Where a point paying a higher aggregate rate complains that it is being prejudiced by a point paying a lower aggregate rate the Commission has frequently found such prejudice to exist and adjusted the rates to a similar level, transportation conditions considered.

A recent case involving that principle is *California Fruit & Produce Company et al.* v. *A. T. & S. F. Ry. Co. et al.*, 148 I. C. C. 285, 160 I. C. C. 733. In that case, which involved, among other issues, rates on apples from the State of Washington to San Diego, Calif., the Commission upon page 739, after pointing out that the spread under the southwestern scale for the distance of 74 miles between San Diego and Los Angeles would be 3.3 cents, found that the rates on apples under attack were and would be prejudicial to dealers at San Diego and unduly preferential of similar interests at Los Angeles to the extent that the rates to San Diego exceed those to Los Angeles by more than 3 cents per 100 pounds.

In such a case it is doubted that appellants here would seriously contend that the Commission was without power to find the prejudice existing and to remove it in the manner in which they did; that is, a lower rate was found to be prejudicial to a higher rate by reason of the fact that the then existing differences between the rates did not properly reflect the different transportation conditions and required that such situation be remedied by rates upon relatively the same basis. If the fact of the prejudice be conceded and the propriety of the remedy admitted in those cases where the preferential rate is the lower rate, the theory is equally sound in the reverse situation where the contention is made that a point pay-

ing a lower or the same rate is prejudiced by a point paying a higher or the same rate, transportation conditions considered. If the theory is correct in one instance it must of necessity be so in the other. Stated in another way, competing points and parties are entitled to rates relatively upon the same basis, transportation conditions considered. That such is the requirement of Section 3 was announced by this court in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, where, at page 524, it is stated:

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that is is not justified by the cost of the respective services, by their values, or by other transportation conditions."

The contention of appellants that preference or prejudice cannot arise out of rates equal in cents per 100 pounds has no support in logic and has been rejected by the Commission and the courts. The finding of the Commission in this case is neither arbitrary nor unreasonable. It gives effect to a doctrine announced by itself and approved by the courts. It should be pointed out, however, that full recognition is not given by the Commission's decision to the different transportation conditions, for the differentials prescribed by the Commission are smaller in amount than would result from the application of mileage scales approved by the Commission for application in the territory involved to the respective hauls to and from the Texas ports and New Orleans (Ex. B-17, Vol. VI, Reproduction of Stipulated Exhibits).

In the brief on behalf of the State of Louisiana, at page 42 *et seq.*, that appellant would treat the orders of the Commission herein designed to remove prejudice and

preference as orders establishing differentials, and upon that theory such appellant claims that such orders are unlawful because not predicated upon a finding as to just and reasonable rates. Section 1 is in no way involved in this case and the orders relate solely to the removal of prejudice and preference found to exist in the rate structure. Preference or prejudice in rates is wholly without relation to their reasonableness. A charge may be perfectly reasonable under Section 1 and may create an unreasonable preference or advantage under Section 3. It was so held in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515.

IV.

THE TEXAS & PACIFIC AND LOUISIANA RAILWAY & NAVIGATION COMPANIES SERVING DIRECTLY THE PREFERRED PORT NEW ORLEANS AND PARTICIPATING IN JOINT THROUGH RATES TO THE PREJUDICED TEXAS PORTS ARE PROPERLY SUBJECT TO THE FINDING OF PREJUDICE AND PREFERENCE MADE BY THE INTERSTATE COMMERCE COMMISSION.

Appellants contend that different carriers are responsible for the level and relationship of rates between points on the Texas & Pacific, Louisiana Railway & Navigation Companies, and the port of New Orleans, on the one hand, than are responsible for the level and relationship of rates between the same inland points and Texas ports, on the other, and that a valid order under Section 3 of the Interstate Commerce Act to remove the prejudice found to exist against the Texas ports and the preference in favor of New Orleans can not be made against those carriers. This subject is treated in Part IV, page 82, of the Texas & Pacific brief; Part V, page 68, of the

New Orleans Joint Traffic Bureau brief; and Part III, page 30, of the brief of the State of Louisiana.

A similar contention was made by the parties in the proceedings before the Interstate Commerce Commission, and although such contention was upheld in the first report of the Commission on further hearing, after further evidence and reargument the Commission in its second report on further hearing dated December 23, 1929, reversed its former finding and made its Section 3 order heretofore made against other parties applicable to the Texas & Pacific and Louisiana Railway & Navigation Companies. Such action of the Commission is fully supported by the facts and by the law.

Briefly stated, the underlying facts as to the carriers serving the different ports and their participation in rates to and from such ports are as follows: the Texas & Pacific and Louisiana Railway & Navigation Companies serve directly with their own rails the preferred port of New Orleans. They do not with their own rails serve the prejudiced Texas port Galveston but participate generally in a complete line of joint through rates between points on their lines of railroad and the prejudiced port Galveston (R. 3228). The Gulf, Colorado and Santa Fe, Missouri-Kansas-Texas, and certain other Texas carriers serve directly with their own rails the prejudiced port Galveston but participate generally in joint rates between points on their lines and the preferred port New Orleans. Other lines such as the St. Louis Southwestern, Chicago, Rock Island & Pacific, Chicago, Rock Island & Gulf, St. Louis-San Francisco, and a number of other carriers serve directly with their own rails neither the preferred port New Orleans nor the prejudiced port Galveston, but participate in joint rates between points on their lines and both New Orleans and Galveston. Other lines such as the Southern

Pacific serve directly with their own rails both New Orleans and Galveston. As to ports served directly by its own line of railroad, any line can by individual action reduce or increase rates from points on its line to such ports. From points on its line of railroad to a point on another line of railroad, according to practices of the lines involved which publish their rates through publishing agents, such line can by individual action and without the concurrence of its connections, increase such rate from any point on its line to a point on another line of railroad, but can not without the concurrence of its connections reduce a rate from a point on its line to a point on another line of railroad.

Therefore the situation is this: the Texas & Pacific and Louisiana Railway & Navigation Companies, serving directly the port of New Orleans, can by their individual action without consent or concurrence of any other line increase or reduce rates to New Orleans from points on their lines of railroad. From points on their lines of railroad to the Texas ports they may increase such rates without the concurrence or consent of their connections, but to reduce such rates would require the consent and concurrence of such connections.

Similarly as to the Gulf, Colorado and Santa Fe, which serves directly the port of Galveston, it can increase or reduce its own rates to Galveston without the concurrence or consent of its connections, and from points on its line to New Orleans it may increase such rates without the concurrence of its connections, but to reduce any rate from a point on its line of railroad to New Orleans it would be required to secure the consent or concurrence of its connections.

Under the circumstances and facts as above described, and which facts would of course be duplicated in the

case of an alleged prejudice or preference as to two competing points in any part of the country, the rule contended for by appellants here would make impossible in any and every such case a finding of prejudice and preference. The contention of such parties is, however, unsound, and effective single and unhampered control by any one carrier of rates both to the point alleged to be preferred and to the point alleged to be prejudiced is not necessary in order to make a lawful finding as to a violation of Section 3 of the Interstate Commerce Act.

Bearing the above facts in mind we will proceed to a discussion of that case which is determinative of the entire issue herein, namely, *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515. In that case the local rate of the Illinois Central from Fernwood, Miss., to Ohio River crossings on lumber was found to prefer Fernwood and to prejudice Knoxo, Miss., on the line of the Ferwood & Gulf, and a Section 3 order was made against both the Illinois Central and the Fernwood & Gulf, operating from Knoxo to a junction with the Illinois Central Railroad at Fernwood, to remove such prejudice and preference. In that case a contention was made similar to that here made by the Texas & Pacific and Louisiana Railway & Navigation Companies, and the port of New Orleans. In rejecting this contention the court said at page 520:

> "It is contended that the order exceeds the powers of the Commission. The argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence, that it cannot be required to cooperate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable.

That, on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines *and it is not in a position to remove, by its own act, the discrimination complained of. Neither proposition is sound.* Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced, as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central cannot remove the discrimination without the cooperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point."

This court has there interpreted Section 3 and set forth the conditions under which the Commission may issue an order against carriers to cease and desist from a violation of that section. The facts here are much stronger than those before the Commission in the cast just cited. There the Fernwood & Gulf contended it did not participate in the discrimination complained of since it did not join in the lower rates from other points by which the Swift Lumber Company claimed to be prejudiced. Here the Texas & Pacific and Louisiana Railway & Navigation Companies, by their own

action, not joined in by any other carrier, make the rates to New Orleans which prefer that port and which prejudice the Texas ports. On the other hand, the Illinois Central contended that it could not be subjected to a Section 3 order because Knoxo was not on its lines and it was not in position to remove, by its own act, the discrimination complained of. This court said, however, neither proposition is sound.

In *United States* v. *Illinois Central Railroad, supra,* the court deals at great length with the discrimination between Fernwood and Knoxo, Miss. It should not be overlooked, however, that there was decided in the same opinion Case No. 38, which was an appeal from a decision of a Federal court in Wyoming dismissing a bill seeking to enjoin the order of the Commission in *Pioneer Lumber Company et al.* v. *Director General, et al.,* 64 I. C. C. 485. In that case rates on lumber and lumber products, in carloads, from points in Idaho, Montana and Washington to Ucross and Buffalo, Wyo., were found unduly prejudicial and such prejudice ordered removed. Ucross and Buffalo, Wyo., are located on the Wyoming Railway, a short line of railroad connecting with the Chicago, Burlington & Quincy at Clearmont, Wyo. The prejudice found consisted in the failure to apply a blanket rate on lumber, applicable among other points at Clearmont, to Ucross and Buffalo, Wyo., on the short line. In disposing of this appeal this court said (527):

> "In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, expressed or implied. Undue prejudice may be inflicted as effec-

tively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases."

There the Wyoming Railway was found guilty of a violation of Section 3, although it did not participate in joint rates beyond the junction point with the trunk line. Its participation was solely in a local rate from points on its line to a junction with the Burlington and a Section 3 order was issued against the Burlington and the Wyoming Railway to remove the prejudice. Here the case is much stronger. The Texas & Pacific and Louisiana Railway & Navigation Companies actually participate in joint through rates to the points found to be prejudiced and initiate and maintain their own single-line rates to the points found to be preferred.

This court in *United States* v. *Illinois Central Railroad, supra,* has laid at rest for all time the doctrine enunciated by the Commission in the *Ashland Fire Brick Company case,* 22 I. C. C. 115, to the effect that a carrier can not be held liable for a violation of Section 3 unless it can, by its own act, and without the concurrence of any connection, remove the discrimination found to exist by changes in the rates to either the preferred or prejudiced points.

Another expression of this court contrary to the contention of appellants is found in *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, where at page 144 the court says:

"Carriers insist also that the order is void on the ground that, since their 'rails do not reach Paducah, they cannot be guilty of discrimination against that city.' They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities

> require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it."

Discrimination was found to exist by the Commission, and while the order of the Commission was one requiring the establishment of through rates under Section 15 of the Act, nevertheless the court has laid down a guide as to when discrimination may be found to exist.

Another recent case approving the doctrine announced in *United States* v. *Illinois Central, supra,* and repudiating the contention made by appellants is *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States,* 270 U. S. 287. In that case an order of the Interstate Commerce Commission requiring several carriers to remove discrimination against another carrier resulting from their refusal to make switching arrangements with it such as existed among themselves was upheld by the court. At page 292 of the opinion of the court the following language appears:

> "It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier.
>
> The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 521. Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v.

United States, 245 U. S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. *United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 197-9. There is nothing to the contrary in *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. Here each of the steam railroads was an effective instrument of the discrimination complained of."

The above case is also interesting because it explains and distinguishes the case of *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, which is to a great extent relied upon by appellants in this case. As pointed out, however, that case furnishes no sound authority for the position of appellants. There was there involved the validity of a Section 3 finding based upon the granting of certain transit privileges upon creosote by southern railroads, which privileges were not granted by railroads in trunk line and New England territory, and the finding was based particularly upon the fact that joint rates were participated in by the New England, trunk line and southern carriers. The plants and shippers in the North were alleged to be prejudiced by the granting of certain free transit privileges by the southern carriers. The prejudice, however, did not arise out of the joint rates. The court, at page 259, says:

"But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination;

as where a lower joint rate is given to one locality than to another similarly situated."

Here the Texas & Pacific and Louisiana Railway & Navigation Companies have particiapted in that which causes the unjust discrimination. The discrimination is caused by a preferential rate to and from New Orleans and prejudicial rate to and from Galveston. The Texas & Pacific and Louisiana Railway & Navigation Companies singly and alone make the preferential rates between New Orleans and points on their lines and participate in the prejudicial rates between points on their lines and the Texas ports.

It is without significance that such participation by the Louisiana port lines in joint rates to the Texas ports is responsive to requirements of the Commission in orders entered pursuant to paragraph (4) of Section 1 of the Interstate Commerce Act requiring the establishment of just and reasonable rates. The controlling fact is that the Louisiana port lines do participate in the prejudicial rates to the Texas ports.

The clear and unequivocal language of this court in *United States* v. *Illinois Central, supra,* is completely and wholly determinative of the issue here presented to the court, as to whether the Texas & Pacific and Louisiana Railway & Navigation Companies can be made amenable to the finding of the Commission as to preference and prejudice made in the proceedings before it. In an effort to explain away this case it is stated in the briefs of appellants that if the facts in the *Illinois Central case* are fairly analyzed it is easily appreciated that a different situation is presented to the court here. The fair analysis undertaken is substantially the contention that in that part of the *Illinois Central case* dealing with rates from points on the Fernwood & Gulf, the principal defendant was the Illinois Central and the principal com-

paint that it would not extend the blanket rate it maintained from points on its line to points on the line of the Fernwood & Gulf; and in that part of the case dealing with rates from points on the Wyoming Railway, that the principal issue was the refusal of the Chicago, Burlington & Quincy and other trunk line defendants similarly to extend a blanket rate maintained by themselves to points on the line of the Wyoming Railway. To express the contention in the language used in the New Orleans brief, at pages 107 and 108: "The Fernwood & Gulf was but an incident in the whole proceeding." In fact, at page 105 of the New Orleans brief the statement is made that in both the Fernwood & Gulf and Wyoming Railroad cases the proceedings were sought to enjoin orders of the Commission requiring the extension of blanket rates to points on connections of the trunk lines. Such statement is incorrect as it appears from the foregoing quotation that in both cases the orders of the Commission were alternative in form, permitting either a reduction in the rate from the point on the short line or increases in the rates from points on the trunk lines.

Whether the Fernwood & Gulf in the one case, or the Wyoming Railroad in the other case, were but incidents in the whole proceeding is utterly without legal significance. An order directed by the Commission against what the New Orleans interests would claim are the real guilty parties, the Illinois Central Railroad in one case and the Chicago, Burlington & Quincy Railroad Company in the other case, would afford no relief to the complaining parties, the shippers on the short lines of railroad. To give relief to such complainants it was necessary that a valid legal order be made under Section 3 of the Interstate Commerce Act and directed against the short lines of railroad. In the case of the Fernwood & Gulf, it participated in a joint rate from a point on

its lines to the Ohio River crossings, but participated in no joint rate from the junction point with the Illinois Central to the destinations involved. It had no control over that rate in any manner or form and therefore could in no possible manner be considered to have an alternative to remove the discrimination by a reduction of the preferential rate or an increase in the prejudicial rate, except with the concurrence of its connection. Likewise in the case of the Wyoming Railway, it did not even participate in a joint through rate from points on its line of railroad to the destinations involved. It named only a local rate to a junction with the Burlington, the trunk line railroad. By no stretch of the imagination can it be considered to have had an alternative which might be exercised solely by itself. Yet to give any relief to the complainants it was necessary to direct a Section 3 order against those carriers. Such an order directed against the trunk lines in either case would be of no effect, yet an order was made against these carriers under the situation outlined and was upheld by this court in each case.

At page 98 of the New Orleans brief it is stated: "* * * this court has also taken the view that there is no violation of Section 3 unless the particular carrier defendant is responsible for both the undue preference and the undue prejudice as alleged." The case of *United States* v. *Illinois Central Railroad, supra,* constitutes a clear and complete answer to such contention. Even assuming as appellants would have it, that the Illinois Central in one case and the Burlington in another case, the trunk line carriers, were the real guilty parties, neither of such parties have an alternative method of complying with the order. They could change their own rates from their junctions with the short line, but to make a change in the rate from a point on the

short line railroad required an agreement and concurrence with such short line. It would be without legal significance whether or not such short lines were willing to join in making any such change. What is of legal significance is that the order was directed against both carriers, neither of which alone or singly could comply with the orders in an alternative manner.

A number of Interstate Commerce Commision cases are cited in the briefs of appellants herein to sustain their contention as to the necessity of individual alternative in order to give validity to a Section 3 order. It is believed unnecessary to burden the court with a discussion of such cases. In so far as they are contrary to the doctrine laid down by this court in *United States* v. *Illinois Central, supra,* they do not correctly state the law. It should be pointed out, however, that the Commission's decisions along this point have not even in the past been uniform. Just prior to the decision of the Commission in this proceeding a most important case in which it definitely departed from the principle of the *Ashland Fire Brick case,* 22 I. C. C. 115, is the case of *Duluth Chamber of Commerce* v. *C. & N. W. Ry. Co.,* 156 I. C. C. 156, in which the Chicago & North Western Railway was ordered to remove undue prejudice found to result from the granting of a concentration privilege on dairy products upon traffic shipped to Chicago, and their refusal to accord a like privilege in connection with shipments destined to Duluth. That carrier pointed out that such discrimination was forced by competition over which the Chicago & North Western had no control, and although it may be compelled to cancel the concentration privilege to Chicago, such privilege would still exist in connection with the Union Pacific and Chicago, Burlington and Quincy and therefore the situation was one over which it had

no control. Nevertheless, an order to remove the undue prejudice and preference was made against the Chicago & North Western Railway Company.

In the *Duluth case* the doctrine that a Section 3 order can be made only against that carrier which can by its independent act effectively remove the unlawful prejudice and preference is finally interred. The theory that a carrier can not be made liable to a Section 3 order unless it can control by its independent act the rates to both the prejudiced points and the preferred points, had been previously disposed of by this court.

Otherwise Section 3 would be an ineffective weapon in the hands of the Commission to correct the prejudice and preference created by combination of carriers. That section would have vitality only in those rare cases where a single carrier served with its own rails both the preferred point and the prejudiced point. In the wide-flung commerce of the United States today and the participation in that commerce by the numerous railroad systems of this country, that situation is one which indeed would rarely be found.

In a number of recent cases the Commission has directed order to remove prejudice and preference against carriers which acting alone could not comply with such orders.

In *Nueces County Navigation District* v. *Abilene & Southern Ry Co.*, 155 I. C. C. 712, the failure of defendants to provide export and coastwise rates on cotton and cotton linters from points in various southwestern states to Corpus Christi, Texas, no greater for like distances than similar rates contemporaneously maintained to other Texas ports, was found unduly prejudicial to Corpus Christi and preferential of other Texas ports

and such violation of the law ordered removed. At page 714 of that decision it is stated:

> "An identical mileage basis of rates, subject to our jurisdiction, applies generally from Texas points of origin to all Texas ports, except as hereinafter noted, for coastwise movement beyond the State of Texas. These rates do not include wharfage at the ports. To Corpus Christi this scale or, in certain instances, somewhat lower specific rates are applied by the Southern Pacific and Missouri Pacific systems and the Texas Mexican from points on their lines, but not by other lines operating in Texas. On export traffic from Texas points moving through Texas ports specific rates apply predicated upon a similar mileage basis. The amounts of the rates include cost of delivery to steamships at the ports. Wharfage charges not to exceed 2 cents are absorbed by the rail carriers out of these rates. To Corpus Christi these export rates also are applied only by the Southern Pacific and Missouri Pacific systems and the Texas Mexican from points on their lines and not by other lines in Texas.
>
> From points of origin in the States other than Texas through rates, generally on a group basis, are maintained on cotton to most of the Texas ports but not to Corpus Christi."

In that case, therefore, it appears from the opinion that carriers such as the Santa Fe and Missouri-Kansas-Texas served and maintained export and coastwise rates to Texas ports other than Corpus Christi, but neither served nor participated in any joint export and coastwise rates from points on their line to Corpus Christi.

Nevertheless a Section 3 order was entered against the Santa Fe and Missouri-Kansas-Texas under those circumstances, the Commission finding that the failure of those and other defendants to maintain export and coastwise rates from the origin territory considered to Corpus Christi upon a level no higher than rates contemporaneously maintained for like distance to other Texas ports, was unduly prejudicial to Corpus Christi and

unduly preferential of other Texas ports. In the case of the Texas & Pacific and Louisiana Railway & Navigation Company in this proceeding there is even more ground for a Section 3 order because those carriers do actually participate in joint through rates to the prejudiced ports.

In the recent case of *International Paper Company et al.* v. *A. & V. Ry. Co.*, 153 I. C. C. 171, rates on wrapping paper and other paper articles from Bastrop and West Monroe, Louisiana, to destinations in southern territory were found unduly prejudicial to those points and preferential of New Orleans and Bogalusa, Louisiana, and East Moss Point, Kreole and Pascagoula, Mississippi. As shown in the Commission's opinion, Bastrop is served by the Arkansas & Louisiana Midland Railway, the Bastrop & Lake Providence Railway, and the Missouri Pacific Railroad. West Monroe is a local station on the Yazoo & Mississippi Valley Railroad. The finding in that opinion was that the rates assailed in so far as the same defendants, or any of them, participate in the transportation from the complaining points on the one hand and one or more of the competing points on the other, were and for the future would be unduly prejudicial to complainants and unduly preferential to those competitors in New Orleans, Bogalusa, East Moss Point, Kreole and Pascagoula. This order was directed against practically all railroads in southern territory, and therefore a line such as the Atlantic Coast Line Railroad, with its own rails to neither the preferred nor prejudiced points, became amenable to the Section 3 order by participation in rates and transportation from both the preferred and prejudiced points. Obviously a line such as the Atlantic Coast Line, reaching none of the points, could not by its independent act affect rates from either the prejudiced or preferred points.

At pages 74 and 75 of the New Orleans brief appellants would make the point that there is an entire lack of control in the Texas & Pacific and Louisiana Railway & Navigation Companies over the rates of the direct lines serving the Texas ports, because from junction points between such Texas port lines and the Texas & Pacific and Louisiana Railway & Navigation Companies the Texas port lines may make their own local rates without reference to the Texas & Pacific or the Louisiana Railway & Navigation Companies. This point is also without legal significance. In the first place it overlooks that from all of such junction points the Texas & Pacific and Louisiana Railway & Navigation Companies participate with the Texas port lines in joint through rates to the Texas ports. Therefore, having their own rates from all such points to New Orleans, and participating in joint rates to the Texas ports, they legally participate in both the preferential and prejudicial rates. To refer again to *United States* v. *Illinois Central, supra,* and draw a parallel, the Texas & Pacific and Louisiana Railway & Navigation Companies are in no different position than the Fernwood & Gulf or the Wyoming Railway. In the first case the Fernwood & Gulf, connecting with the Illinois Central Railroad at Fernwood, was without control over and certainly had no voice in the fixation by the Illinois Central in any rate it desired over its own line of railroad from Fernwood to the Ohio River crossings. In the second case the Wyoming Railway had no control over nor voice in the fixation of rates by the Chicago, Burlington & Quincy Railroad from the junction of the Wyoming and the Burlington to the destinations involved. Yet this court said:

> "The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate

> rate. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point."

This court there announced the lack of necessity of an alternative in each single defendant which it might exercise without reference to its co-defendants. In the Fernwood case the alternative left was that the Illinois Central acting in conjunction with its connection the Fernwood & Gulf, could reduce the rate from Knoxo. Acting alone it could increase the rate from Fernwood, the junction point. As to the Fernwood & Gulf, it could remove the discrimination solely through concerted action with its connection. Here, however, to paraphrase the language of this court, the Texas & Pacific and the Louisiana Railway & Navigation Companies, acting alone, are in a position to increase the rate from points on their lines of railroad. For their main lines extend from such points to New Orleans.

In the brief of appellant New Orleans Joint Traffic Bureau several English cases are cited in support of its theory that the Texas & Pacific and Louisiana Railway & Navigation Companies are not guilty of the preference and prejudice found by the Commission to exist, and from the fact that this court in *Interstate Commerce Commission* v. *Baltimore and Ohio R. R. Co.*, 145 U. S. 263, stated at page 284 that it might be presumed that Congress had in mind the construction given to the words "undue preference" by the English courts, would draw the conclusion that this court should follow such English cases. To the extent that such cases hold there must be a coupling of preference with prejudice to justify a finding that Section 3 is violated, they are in accord with decisions of this court and the Commission. To the extent

that any such case holds that a charge of undue preferance and prejudice can not be maintained unless a single carrier is responsible for both the alleged prejudicial rates as well as the alleged preferential rates, it is directly contrary to the interpretation heretofore correctly placed upon Section 3 of the Interstate Commerce Act by this court.

The doctrine that when a statute has been adopted from another State or country, the judicial construction already placed upon such statute by the highest court of the jurisdiction from which it is taken accompanies it and is treated as incorporated therein is subject to certain well-defined exceptions. The general rule is by no means absolute or imperative on the courts of the adopting State. See *Viterbo* v. *Friedlander*, 120 U. S. 707; *Groves* v. *Sentell*, 153 U. S. 465; *Meyer* v. *Richards*, 163 U. S. 385.

The rule that the adoption of a foreign statute carries with it the prior construction in the originating State is applicable only where the terms of the statute are of doubtful import so as to require construction. *Public Service Ry. Co.* v. *Board of Public Utility Commissioners*, 81 N. J. L. 363, 80 Atlantic 27. Or where the courts of the adopting State are clearly of opinion that the foreign construction is erroneous and that its application would lead to denial of a substantial right. *Whitney* v. *Fox*, 166 U. S. 637; *Coulam* v. *Doull*, 133 U. S. 216. Section 3 of the Interstate Commerce Act is not ambiguous and this court has stated that the order of the Commission may run against every carrier participating in a violation of that section. In *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States*, 270 U. S. 287, at page 293, it is stated:

> "Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may

extend to every carrier who participates in inflicting the injury."

In *Lever Brothers, Ltd.* v. *Midland Ry.*, 13 Railway & Canal Traffic Cases 301, relied upon by appellants, it was held that the Midland Railway could not be guilty of a preference although it served wholly with its own rails the prejudiced point and participated in the lower and preferential rates for a part way over its systeem under a through rate arrangement, the court holding that a case of undue preference could not be made out by comparing a local rate of a railway company with a through rate of another company over its line. If such restricted doctrine were the law in this country the Illinois Central could not have been held liable for preference and prejudice in *United States* v. *Illinois Central, supra,* because the local rate of the Illinois Central from Fernwood to points north of the Ohio River could not be compared with the joint rate of the Illinois Central and the Fernwood & Gulf from Knoxo to the same destinations.

It is therefore apparent that this court is clearly of the opinion that the construction of the English courts upon this particular feature of the law is erroneous. The holding of this court in *Interstate Commerce Commission* v. *Baltimore and Ohio R. R. Co.*, 145 U. S. 263, only approved the holding of the English courts that an inequality of condition and a change of circumstances can justify an inequality of charge, and in no way approved the doctrine that undue preference or prejudice could not exist unless such prejudice or preference could be removed by a single carrier. In fact, the court stated at page 284 of that opinion, referring to the equalization law:

"These traffic acts do not appear to be as comprehensive as our own, and may justify contracts

which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination."

As heretofore stated, were the theory of law advocated by appellant upheld, a violation of Section 3 could never exist in the case of a joint through rate. Certainly it was the intention of Congress that the provisions of Section 3 should apply as forcefully to the joint undertakings of carriers as to their single acts, that is, to their joint rates as well as to their local rates.

In appellants' briefs a great many cases are cited wherein the Commission has declined to make a preference and prejudice order because of the lack of an alternative in each of the defendants to remove such preference or prejudice. A lengthy review of those cases is totally unnecessary. An examination of such cases, however, indicates that the Commission either relied expressly upon the doctrine announced by it in the *Ashland Fire Brick case*, which doctrine has been definitely and unequivocally overruled by this court, or found that the carriers not guilty of discrimination participated in no way in the unlawful acts complained of. As to the first class of cases, further reference is unnecessary. The doctrine there announced has been definitely repudiated by this court and the Commission has properly brought its own findings within the proper interpretation of Section 3 as laid down by this court.

It should be pointed out, however, that the facts in the *Ashland Fire Brick case* are not similar to those presented to the court here. There the St. Louis-San Francisco Railway carried rates from St. Louis to Birmingham which were alleged to be preferential, and the Chesapeake & Ohio and Louisville & Nashville rates from Ashland, Ky., to Birmingham which were prejudicial, but there was no showing that the St. Louis-San

Francisco participated in any rates from Ashland to Birmingham or that the Chesapeake & Ohio and Louisville & Nashville participated in the rate adjustment from St. Louis to Birmingham. Here the Texas & Pacific and Louisiana Railway & Navigation Companies participate in the preferential rates to the Louisiana ports and the prejudicial rates to the Texas ports.

Typical of the other class of cases is *Wichita Motors Company* v. *A. & V. Ry. Co.*, 88 I. C. C. 152, where the Commission said:

> "It is a well-established principle that undue prejudice or preference may not be said to exist between shippers and communities unless the same carrier serves them or participates in their traffic."

Here the Texas & Pacific and Louisiana Railway & Navigation Companies participate in the traffic to both New Orleans and the Texas ports.

On page 111 of the New Orleans Joint Traffic Bureau brief the statement appears:

> "If the Texas & Pacific can be required, under a Section 3 order, to adjust its rates in relation to the rates from Dallas to New Orleans according to the rates maintained by the Santa Fe from Dallas to Galveston, it will be equally possible, as a matter of law, to make the Dallas-New Orleans rate of the Texas & Pacific depend on the rate of the Louisville & Nashville from Birmingham to New Orleans, or on the rate of the Missouri-Kansas-Texas from Dallas to Kansas City, or on the rate of the Fort Worth & Denver City from Dallas to Denver."

The question as stated above was not before the Commission or now before the court in this proceeding. If, however, the Texas & Pacific as well as naming the rate from Dallas to New Orleans also participated in joint through rates from Birmingham to New Orleans, Dallas to Kansas City, or Dallas to Denver, which would then

be analogous to the situation before the court, a valid Section 3 order could be entered against it.

Also on page 111 of the New Orleans brief the statement is made that, "If this Court goes to the lengths necessary to support the 1929 *order* of the Commission, it will have extended the powers of the Commission beyond any boundaries heretofore conceived of." The Commission has constantly and consistently entered prejudice and preference orders under the circumstances appearing in this case.

Probably the most sweeping preference and prejudice order ever made by the Interstate Commerce Commission was that it entered in *Consolidated Southwestern Cases*, 123 I. C. C. 203. In that case it prescribed scales of reasonable maximum rates on numerous classes and commodities in interstate commerce through the southwestern States of Oklahoma, Arkansas, western Louisiana, southern Kansas, southern Missouri, and Texas, and also prescribed such scales as bases for use in constructing rates between the vast territory just described and defined territories in the eastern part of the United States. It also found many inconsistencies, prejudices and discriminations existing in the southwestern rate structure and required that such situation be remedied by its Finding No. 27, which, in substance, provided that if the defendants elected to maintain any lower rates from or to points found to be unduly preferred, rates upon a similar level must be established and maintained from or to points found to be unduly prejudiced.[1] Such

1. The broad extent of the prejudice and preference found to exist in the *Consolidated Southwestern Cases* is shown in the territorial description of the findings as taken from the syllabus of that case:

3. As to all-rail traffic from Oklahoma, Arkansas, western Louisiana, Kansas-Missouri territory, Missouri River cities, Mississippi River gateways, and defined territories to Texas, and from Texas to Oklahoma, Arkansas, and western Louisiana, the Texas common-point rates on articles embraced in No. 14880 found to result in undue prejudice to the complaining northeast Texas

a sweeping finding could never be made under the interpretation sought to be given Section 3 by appellants here, and it is significant to point out that appellants Texas & Pacific Railway Company and Louisiana Railway & Navigation Companies have not challenged the

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cities and in undue preference of other Texas points to the south and west, including the Houston-Galveston group, as indicated.

4. All-rail class and commodity rates on articles embraced in No. 14880 from Mississippi River gateways, Missouri River cities, Kansas-Missouri territory, and defined territories to Texas, Oklahoma, Arkansas, and western Louisiana found to result in undue prejudice to the complaining northeast Texas cities and in undue preference of points in Oklahoma, Arkansas, and western Louisiana as indicated.

5. Class and commodity rates on articles embraced in No. 13535 between Mississippi River gateways, Missouri River cities, and defined territories, on one hand, and points in Oklahoma and in Texas, Arkansas, Kansas, designated portion of Missouri, and western Louisiana, on the other, found to result in undue prejudice to Oklahoma and in undue preference of the other named States or parts of States as indicated.

6. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and designated portions of Kansas and Missouri, in their relations to relatively lower intrastate rates within those portions of Kansas and Missouri, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

7. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and Texas, and on articles embraced in No. 14416 from Little Rock, Ark., to Texas, in their relations to relatively lower rates between Shreveport, La., and Texas, and from Shreveport to Texas, respectively, found to result in undue prejudice and preference as indicated.

8. Class and commodity rates on articles embraced in No. 14880 between Oklahoma and the complaining northeast Texas cities, in their relations to relatively lower intrastate rates in Oklahoma, and on articles embraced in No. 13535 between Oklahoma and points in Texas common-point territory, in their relations to relatively lower intrastate rates within the latter territory, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

9. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and points in Texas differential territory, in their relations to relatively lower intrastate rates within the differential territory and between that territory and Texas common-point territory, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

10. As a whole, intrastate class and commodity rates in Texas, in their relations to corresponding rates between St. Louis, Mo., and Texas, are not shown to result in undue prejudice or preference, but in some instances, such as rates between Houston-Galveston-Beaumont and northern and northeastern Texas, the intrastate rates result in undue preference, to the undue prejudice of shippers and receivers in St. Louis territory.

11. Class and commodity rates on articles embraced in No. 13535 (a) between Oklahoma and Arkansas, in their relations to

validity of the Section 3 order made in the *Consolidated Southwestern Cases.*

In discussing the situation of the Texas & Pacific and Louisiana Railway & Navigation Companies whose lines of railroad actually reach the port of New Orleans, the court's attention should be directed to the fact that the order in this case is also made against a large number

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relatively lower rates between Arkansas, on one hand, and St. Louis, Mo., Memphis, Tenn., and New Orleans, La., on the other; (b) between Oklahoma and western Louisiana in their relations to relatively lower rates between western Louisiana, on one hand, and St. Louis and Kansas City, Mo., and Memphis, on the other; and (c) between Oklahoma and Texas, in their relations to relatively lower rates between Texas, on one hand, and St. Louis and Memphis, on the other; found to result in undue prejudice and preference as indicated.

12. Class and commodity rates on articles embraced in No. 14880 (a) between the complaining northeast Texas cities and points in western Louisiana other than New Orleans and Shreveport, in their relations to relatively lower rates between western Louisiana, on one hand, and Memphis, Tenn., and St. Louis and Kansas City, Mo., on the other, and (b) between the complaining cities and Arkansas in their relations to relatively lower rates between Arkansas, on one hand, and Memphis, Kansas City, St. Louis, and New Orleans, on the other, found to result in undue prejudice and preference as indicated.

13. Class and commodity rates on articles embraced in No. 13535 between Arkansas and Oklahoma, and on articles embraced in No. 14880 between Arkansas and the complaining northeast Texas cities, in their relations to relatively lower intrastate rates within Arkansas, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

14. Class and commodity rates on articles embraced in No. 13535 between Oklahoma and western Louisiana, and on articles embraced in No. 14880 between western Louisiana and the complaining northeast Texas cities, in their relations to relatively lower intrastate rates in western Louisiana, found to result in undue prejudice and preference and in unjust discrimination against interstate commerce as indicated.

15. Ocean-rail rates between north Atlantic ports and interior trunk-line and eastern defined territory points, on one hand, and points in Kansas and in the Southwest, including Texas differential territory, on the other, via south Atlantic and Gulf ports, found unreasonable and unduly prejudicial and preferential as indicated. Maximum reasonable and nonprejudicial rates prescribed. Findings in *Rates to Southwestern Destinations*, 95 I. C. C. 188, that ocean-rail rates via Gulf ports should not exceed 80 per cent of combinations on those ports and should include marine insurance, overruled.

The *Consolidated Southwestern Cases* has been reopened as to a number of features and as to prejudice and preference in connection with rail-and-water rates, but the findings of prejudice and preference have so far been substantially unchanged.

of lines of railroad, such as the St. Louis-San Francisco Railway Company, Fort Worth & Denver City Railway Company, St. Louis Southwestern Railway Company, and a number of others, which railroads reach with their own lines neither the Texas ports nor New Orleans. It should be obvious that the Texas & Pacific and Louisiana Railway & Navigation Companies, making their own rates to the preferred port and participating in joint rates to the prejudiced ports, are even more definitely amenable to Section 3 than the large number of other lines of railroad affected. However, all of such other lines of railroad are properly amenable to Section 3 because they participate in a through line of joint rates with their connections to and from both New Orleans and the Texas ports.

It should be here pointed out that the Commission has authority in all cases to require the establishment of through routes and joint rates, but that if appellants' contentions are correct all power of the Commission to remove preference or prejudice existing in joint rates is taken away, because obviously in the case of a joint rate there can never be a single carrier able to adjust such rate without concurrence. Such adjustment must always be a matter of agreement. Nevertheless it can hardly be seriously contended that Section 3, practically the cornerstone of the Interstate Commerce Act, has no application to joint through rates.

The New Orleans brief in concluding its discussion of this subject, propounds the following query (112):

> "In conclusion on this point, we present a query for which we must confess we know no answer: Assume, after the Commission entered the alternative order which we here seek to enjoin, that the Santa Fe announced that it elected to comply therewith by having the Texas & Pacific increase its rates between Dallas and New Orleans, and the Texas &

> Pacific, on its part, announced that it elected to comply therewith by having the Santa Fe reduce its local rates between Dallas and Galveston and by joining with the Santa Fe in reducing the joint rates of the Texas & Pacific and the Santa Fe between Dallas and Galveston; and further assume that an impasse is reached in that neither of these competing carriers will go along with the alternative method of removing the preference and prejudice suggested by its competitor; in such an event, which of these two carriers is subject to the penal provisions of Section 16 (4) of the Act because of its failure to obey the Commission's alternative order?"

Although appellant confesses it knows no answer to the above query, it is in fact simple. The same situation was present in *United States* v. *Illinois Central, supra.* The Illinois Central and the Fernwood & Gulf might have had difficulty in agreeing whether to reduce the rate from Knoxo or increase the rate from Fernwood. Nevertheless during the period of such disagreement after the effective date of the order of the Commission severe penalties would accrue daily and it is believed that this fact would be extremely persuasive in inducing the managements of the two companies to reach an agreement as to how the order should be complied with. Even were such agreement not actually reached the Commission would still have power under Section 15 to prescribe the exact rate from each point necessary to remove the preference and prejudice.

The interpretation of Section 3 announced by this court in *United States* v. *Illinois Central, supra,* is a sound and logical one, and the Interstate Commerce Commission in its finding in this proceeding has properly followed the interpretation given by this court. Any other interpretation would render Section 3 wholly ineffective in curing prejudice and discriminations found

to exist in the complicated rate structure in the United States today. Only rarely could the situation be found where a single railroad with its own rails served both the point alleged to be preferred, the point alleged to be prejudiced, and the destination or origin territory involved.

V.

THE CONTENTION THAT THE COMMISSION FAILED TO GIVE ANY CONSIDERATION TO THE COMPETITIVE CHARACTER OF THE EXPORT, IMPORT AND COASTWISE TRAFFIC INVOLVED IN THIS PROCEEDING IS WITHOUT MERIT.

Appellants urge that in its 1927 and 1929 orders, the Commission acted arbitrarily and without regard to its statutory duty, in that it failed to give consideration to the fact that competition of competing through rail and ocean routes, via which an equality of charges and provisions prevailed, justified the equalization of the inland rail rate factors. This contention appears in Part III, page 44 and following, of the brief on behalf of the New Orleans Joint Traffic Bureau, and under the Sixth Proposition at page 123 of the brief on behalf of The Texas and Pacific Railway Company.

Stated in another way, it is contended by appellants that the export, import, and coastwise rates involved are in effect but proportional rates, and that the Commission should not give consideration to what is in effect but part of a through rate but should consider the aggregate charge for inland rail transportation and water carriage beyond the ports.

This contention is stated on page 45 of the brief on behalf of the New Orleans Joint Traffic Bureau, as follows:

"We urge that it is arbitrary for the Commission

to base its decision on matters which relate solely to inland rate factors, thereby closing its eyes to the fact that such factors are but part of through charges, and to the fact that the through charges, if port equalization be continued, are on a parity. Where the same through charge is assessed for a similar through service, there can be no undue preference or prejudice, even though, *if a portion only of the rate be dissected*, it appears that for the rail part of the haul the charge is lower per ton per mile when the movement is via New Orleans than when it is via Galveston."

The proper answer to this contention is found in the following language in the 1927 report of the Commission (R. 3404-3405):

"The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate (fol. 5201k-31) through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, division 2 found a similar contention to be without merit. Equalization of port rates on the basis advocated by this carrier would require consideration, in every instance of port relationship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction. This does not mean, however, that the fact that a port is not the origin or destination of the traffic passing through it is not entitled to consideration in countenancing greater disregard of distance in import, export, or coastwise rates than in corresponding domestic rates."

The Commission has thus properly answered the appellants in two respects, first, that it has no jurisdiction

of and cannot consider the volume of or equalization of ocean charges beyond the ports over which it has no jurisdiction and of which it has no knowledge, and second, that the fact that export, import, and coastwise traffic is being dealt with is a fact entitled to consideration, and as we shall hereafter show, was given effective consideration by the Commission.

As to the first point, Section 1 of the Interstate Commerce Act gives jurisdiction to the Commission as to export and import traffic "only in so far as such transportation * * * takes place within the United States." As to coastwise traffic, the Commission, where it is authorized and undertakes to make joint rail and water rates, may consider the water haul, but even in that case, differences in rail mileages are an important factor. Joint rail and water rates were, however, not involved in the proceedings before the Commission.

Appellants rely largely upon *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, as authority for the proposition that the Commission is impotent to interfere with the equalization of rail charges to different ports in the case of rail charges for export and import traffic. That case is no authority for such a broad doctrine. The main issue before the court in that case is stated at page 205 of the court's opinion:

> "We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the sea-board in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic."

It is not authority for the doctrine that in making export rates or domestic rates, prejudice or preference may be permitted as between different localities and communities in the same class of freight. In this connection it should be pointed out that the concluding language of the opinion of the Commission in that case, at page 239, indicates that there was no person, firm, or corporation complaining that he or they had been aggrieved by the disparity between the domestic and the export or import rates. As heretofore stated the Commission is given jurisdiction of export and import rates in so far as rail transportation is concerned, and in so administering that grant of power every section of the Interstate Commerce Act is applicable. Section 3 condemning preferences and prejudices is equally applicable to export, import, coastwise or domestic traffic.

In support of the proposition that the Commission in this case should have considered the entire through charge, the brief of the New Orleans Joint Traffic Bureau, page 49 *et seq.*, cites two English cases. The authorities given, however, are not pertinent, because in each case they deal with actual through rates published and quoted as such from inland points in England or Ireland to ports or inland points in the said parts of the United Kingdom, and by specific authority the railway companies of the United Kingdom are given permission to publish such rates in one figure, showing separately the amount accruing for the rail and water hauls respectively. This appears from the following quotation from *The Londonderry Port and Harbour Commissioners* v. *The Great Northern Railway Company (Ireland), et al.*, 5 Railway and Canal Traffic Cases 282, 292:

> "I come lastly to the complaint that the rates are not equal by the two routes, and that the Great Northern carry at a less rate per mile *via* Greenore than *via* Derry. The applicants calculate that

through receipts *via* Greenore are divided in the proportion in which the distances of the different lines over which through traffic is carried compare with each other, and they then show that the Great Northern, working *via* Greenore, at earnings according to mileage proportion, work by that route at a much lower rate per mile than *via* Derry. Thus fat cattle are carried from Strabane to Chester *via* Greenore at a through rate of 7*s*. 3*d*. a head, and at eight to a waggon, the proportion payable to the Great Northern for the 107 miles of its line is 22*s*. 2*d*. But from Strabane to Chester, *via* Derry there is no through rate, and cattle are booked to Derry at a local rate of 11*s*. 6*d*. the waggon, the distance being only 15 miles, or one-seventh of the Great Northern Company's distance on the other route. Here we may observe that it has not been unusual for Parliament, when granting applications by railway companies for steamboat powers, to require that where persons travelling, or sending goods, both by railway and by sea, are charged one through fare or rate for the whole distance, a tariff of all such through fares and rates shall be published, showing their amount, and distinguishing the portion thereof which is attributed to the sea route from the portion attributed to the land route, and thus to prevent the steamboat charge and the railway charge from being blended into one. But no such provision, as to goods at least, has been introduced into the Acts which confer on the London and North-Western steamboat powers between Greenore and Holyhead, or which confirm the agreements made between that company and the Irish railway companies for maintaining between all principal stations on their lines a complete system of through rates and fares, and of through booking and invoicing for all cross-channel traffic over these railways by way of Greenore and Holyhead. In connection, however, with the first of these agreements the Board of Trade received an undertaking on the part of the companies to publish a monthly list of through fares and rates, and to state the proportion of such fares and rates attributable to the sea passage; and it appears that the applicants requested to be fur-

nished with one of such lists, but that they found that no such lists had at any time been printed or issued. The through rates then by Greenore are made under these agreements, and they are by the terms agreed upon single rates for sea and land transit combined; and an apportioned part of a through rate can hardly be compared with a local rate, as if the two were of a similar kind. Nor does it seem to us to signify how an apportioned part of a through rate by one route compares with a local rate by another route, unless, indeed, the latter has no other rates at which through traffic can be sent by it."

Illustrative of the same condition is the following quotation from *Dublin and Manchester Steamship Company* v. *London and North-Western Railway Company*, 15 Railway and Canal Traffic Cases 88, 98:

> "A second point, and one of much less importance, arises under sub-section 5 of section 33 of the Railway and Canal Traffic Act, 1888, which enacts as follows: 'Where a railway company carries merchandise partly by land and partly by sea, all the books, tables and documents touching the rates of charge of the railway company which are kept by the railway company at any port of the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea.' "

The rail charges to the English and Irish ports dealt with in the above cases were in fact but parts of through rates, authorized by acts of Parliament to be stated and published as such.

It is true that a local rate may not properly be compared with a true proportional rate or with the earnings to a particular carrier under a joint rate published by it and several other carriers for a continuous haul,

but that situation is not at all present in this proceeding. The rail carriers of the United States could not lawfully join with the steamship companies to and from foreign points, in publication of single factor joint through rates between points in the United States and foreign ports. Under the Interstate Commerce Act the charge for the rail transportation within the United States must be published separately and the reasonable non-descriminatory character and lawfulness is within the jurisdiction of the Interstate Commerce Commission. It has no jurisdiction whatsoever of the charges beyond the ports of the United States. The situation is not analogous whatsoever.

As a matter of fact in this proceeding the Commission did give serious and effective consideration to the fact that the traffic involved was export, import, and coastwise traffic and not all-rail domestic traffic. This consideration is manifested in two respects. Under the orders of the Commission complete equalization is permitted of New Orleans with the Texas ports where the difference in distance to New Orleans does not exceed that to Galveston by more than approximately 25 per cent; and in those cases where the difference in distance to New Orleans exceeds that to Galveston by more than 25 per cent, the prescribing of minimum differentials Galveston under New Orleans materially less than would result from the application of scales prescribed in the same territory by the Commission for application to domestic traffic.

In *Consolidated Southwestern Cases*, 123 I. C. C. 263, the Commission prescribed scales of reasonable maximum rates on numerous classes and commodities in interstate commerce throughout the southwestern states of Oklahoma, Arkansas, western Louisiana, southern Kansas, southern Missouri, and Texas, and also prescribed such scales as bases for use in constructing rates be-

tween the vast territory just described and defined territories in the eastern part of the United States. It also found many inconsistencies, prejudices and discriminations existing in the southwestern rate structure and required that such situation be remedied by its Finding No. 27, which, in substance, provided that such discriminations and prejudices should be removed by the uniform application throughout the territory involved of the scale of rates prescribed as reasonable, and that if defendants elected to maintain any lower rates upon any class or commodity in such territory between any two points, such lower basis would have to be established and maintained from or to all points found to be unduly prejudiced.

In this connection it should be pointed out that Exhibit B-17, reproduced in Volume VI of the record herein (Reproduction of Stipulated Exhibits), indicates that the differentials prescribed for the differences in distance between the Texas ports and New Orleans are materially less than the differences in rates for similar distances as prescribed in *Consolidated Southwestern Cases, supra*, and in other cases in which the Interstate Commerce Commission has prescribed mileage scales on commodities for application in southwestern territory. While the *Consolidated Southwestern scales* do not apply to export, import, and coastwise traffic, as such, in most cases domestic rates are the basic rates on export, import, and coastwise traffic. As one illustration of the showing made in Exhibit B-17, page 3 thereof indicates that from stations Marshall to Sweetwater on the Texas & Pacific the average rate on green coffee would be 17.3 cents higher from New Orleans than from Galveston, and 21.4 cents higher from New Orleans than from Houston, whereas the differential required by the Commission in this proceeding is but 9 cents. This establishes clearly that the Commission in prescribing the differentials in-

volved here has not accorded to the Texas ports the entire benefit of their geographical location, but has given serious and effective consideration to the export and import character of the traffic. Such character of the traffic was an element which might properly be considered by the Commission and it was so considered. The position of appellants, however, stated in its true aspect, is not that the Commission failed to give proper weight to the character of the traffic, but that by reason of the character of such traffic the Commission is without jurisdiction over the inland rail portion thereof and can not by lawful order require adjustment in the rail rates to and from competing ports where it finds preference and prejudice such as is prohibited by Section 3 of the Interstate Commerce Act to exist and is powerless to correct such violation of the law regardless of the extent to which distance and cost of service in the case of traffic to the respective ports may be disregarded by competing carriers. There is no such impotence in the Interstate Commerce Act to remedy a violation thereof.

VI.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION INVOLVED IN THIS PROCEEDING DO NOT UNLAWFULLY INTERFERE IN THE MANAGERIAL DISCRETION OF THE TEXAS & PACIFIC RAILWAY COMPANY NOR DEPRIVE THAT COMPANY OF DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the third proposition at page 76 and the twelfth proposition at page 232 of the Texas and Pacific brief the contention is presented that the Commission, by its orders in interfering with the complete port equalization policy of the Texas and Pacific Railway Company, has unlawfully interfered in its right to initiate rate

policies in the exercise of managerial discretion and has deprived the Texas and Pacific Railway Company of its property in contravention of the due process clause of the Fifth Amendment to the Constitution of the United States.

Both of these contentions are essentially the same and will be treated together.

Appellant itself points out the falacy of its contention at page 80 of its brief where it states:

> "Such being the present state of the law, it follows that the long-established and time-honored policy of the carriers serving New Orleans, along with many of their connections, of voluntarily maintaining that port on a rate parity with the Texas ports, where the distances to the latter are less than to New Orleans, is not subject to condemnation *unless in some particular it is in contravention of the law.*" (Italics ours.)

Stated concisely, the proposition of appellant is that it should be permitted to equalize rates to and from the Texas ports at New Orleans in order to secure the benefit of the full and complete use of such properties. The desire of carriers for business is understandable and so long as such rates are not otherwise unlawful they may maintain a rate adjustment designed to secure a greater share of the business for their particular line of railroad. Such desire, however, is without legal significance or effect upon Commission or Court when rates published to accomplish such purpose violate any section of the Interstate Commerce Act. The desire of a carrier to favor points upon its own lines of railroad can not excuse the publication or maintenance of rates which result in prejudice or preference to any locality, shipper or person. This doctrine was laid down by this court in *Virginian Railway* v. *United States et al.*, 272 U. S. 658. In that case the court condemned a prejudice and preference resulting incidentally from the intention and policy of the Virginian to develop its own business. The

facts of the case and the principle of law enunciated are clearly set forth in the following quotation from the court's opinion commencing on page 663 thereof:

> "The Virginian contends that the specific facts found are, as matter of law, insufficient to support the finding of undue prejudice. The facts material are these. Ever since the Virginian was constructed, it has adhered to the policy of providing for the output of mines on its line transportation only to tidewater. This policy is pursued, not only because it is deemed profitable to the company, but also because it enables the Virginian to furnish to shippers the most efficient service at reasonable rates. It has never held itself out as equipped to carry coal to the West, or joined in joint rates to western markets. The 45 mines on its line which enjoy the blanket rates to the West, have them as a natural result of certain trackage agreements entered into by the Virginian with the Chesapeake & Ohio for an entirely different purpose. The purpose was to secure additional eastbound tonnage without wasteful expenditure by paralleling branch lines. To be able to secure the eastbound traffic from certain mines located on independent lines connecting with the Chesapeake & Ohio, the Virginian, having acquired the independent lines, sought the right to use that system's tracks to those mines. As compensation for the trackage rights over the Chesapeake & Ohio, it gave that company the right to use the Virginian's tracks to these 45 mines. The carriers, instead of using these trackage rights by operating over the other's tracks, substituted, solely as a matter of economy and convenience, a reciprocal switching arrangement. As a result, the Virginian hauls westbound coal from these 45 mines to a junction with the Chesapeake & Ohio; the latter absorbs the switching charges of the Virginian; and these mines enjoy the same rate to the West as do those located on the Chesapeake & Ohio. But the Virginian's purpose in making the traffic agreement was solely to increase its eastbound traffic.
>
> The fact that the Virginian's intention was not to give the 45 mines a preference over others, but to increase its own eastbound business from mines lo-

cated on the other system, and that the preference resulting is merely an incident of a legitimate effort to develop the carrier's eastbound traffic, is not of legal significance. These 45 mines to which the western market has been thus opened, obviously, enjoy thereby an advantage over the 54 mines, found to be similarly situated, to which the market is closed. And the Commission has found that the preference is unjust."

Dealing with a somewhat similar situation, in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, the Illinois Central made the contention that the effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. The court, however, in answer to this contention, on page 524 says:

"But preferences may inflict undue prejudice though the carrier's motives in granting them are honest."

Further on page 525 the court continues:

"The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimina-

tion against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate-making. See *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 554. It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo to undu prejudice. The judgment so exercised, being supported by ample evidence, is conclusive."

A further specific contention of the Texas and Pacific is made that when the traffic here involved is considered as so-called added traffic, that is traffic which it would not otherwise obtain, it can handle it upon a lower out-of-pocket cost than can the lines handling similar traffic to and from the Texas ports. The full and complete answer to that contention is also contained in the cases above cited. Even though the Texas and Pacific were greatly in need of added traffic, such need would not excuse the making of prejudicial or preferential rates from the viewpoint of the undue preference to New Orleans or prejudice to the Texas ports. There is no reason why the traffic here involved should be considered any differently from any other traffic handled by the Texas & Pacific Railway Company or by any other defendant. Nor is there in the record the slightest evidence that the unit costs of transportation upon the Texas & Pacific are lower than upon the Texas port lines. On the other hand the conclusion was properly reached by the Commission at page 385 of its report on further hearing that differences in lengths of haul con-

sidered, and without comparing special services on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans or the other Louisiana ports as it does over the Gulf Colorado and Santa Fe or the Missouri-Kansas-Texas of Texas to Galveston or any other Texas port.

However, the so-called added cost computations of the Texas & Pacific were rejected by the Commission and properly so. Dealing with this subject the Commission in its second report on further hearing says (Rec., 3449):

> "It estimates that the out-of-pocket cost of such additional eastbound traffic on the Louisiana division would have been, per net-ton mile, 2.02 mills in 1926 and 2.14 mills in 1927. In contrast, it shows that on the Texas lines both the net-ton miles and freight-train miles are substantially greater southbound than northbound, which indicates, it contends, that their southbound trains are already fully loaded and that the additional traffic which might be diverted from the New Orleans carriers by the differentials in favor of the Texas ports sought in this case would require the running of additional trains, in which event it estimates that in 1926 the cost of such additional southbound traffic would have been 6.09 mills on the Santa Fe and 8.07 mills on the M-K-T. By similar computations of the system costs on the Santa Fe and the M-K-T of handling additional freight traffic without increased train miles, the Texas & Pacific arrives at 2.83 mills for the former and 3.84 mills for the latter. In arriving at these costs, however, no segregation is made between the northbound and southbound traffic over the Texas lines. These computations rest wholly upon estimates of the percentages of increase in various items of operating expense, 32 in number, which in the opinion of the witness who formulated them would result from a 10 per cent increase in train load. Without further data in support of these estimates the computations referred to are not convincing, but even if they were acceptable for the purpose intended, they compare improperly the sys-

> tem costs on both northbound and southbound traffic on the Texas lines with the costs on eastbound traffic only on the Louisiana division of the Texas & Pacific, on which division operating conditions are more favorable than on the lines of that carrier as a whole. No cost data for westbound traffic, with which this case is also concerned, were offered. What has just been said with respect to out-of-pocket costs on the Texas & Pacific applies also to somewhat similar data offered by the Louisiana Railway & Navigation system. The percentage of engine utility westbound on the Texas & Pacific, this carrier contends, indicates that additional tonnage in its present trains could also be handled in that direction, but it offered no figures to show that it could handle such additional tonnage any cheaper than the Texas lines, which could also handle additional tonnage in their present trains from and to the ports served by them."

As the Commission points out, the comparison is without value as like things are not compared. Costs upon a particularly favorable division of the Texas & Pacific are compared with system costs of other lines. Further, these costs are based upon train loading, and for the year 1926 the entire Texas & Pacific train loading was only 579 tons as compared with 825 tons for the Gulf, Colorado and Santa Fe, and the Texas & Pacific witness offering the costs in question admitted (R., 3272-3) that the average unit for the Texas & Pacific would be higher than on the Gulf, Colorado and Santa Fe.

It should be further pointed out that the increased expense in particular accounts account additional freight traffic without additional train miles, was based upon the personal estimate of the witness introducing that testimony, and referring to that fact he admitted (R., 3272) that if he and four or five equally able and competent statisticians and engineers were to prepare a formula there would be four or five different estimates occasioned by a 10 or 20 per cent increase in traffic, and that the

gentlemen would not all arrive at the same percentage of increase as he arrived at. The witness also admitted (R., 3272) that he knew of no basis except probably a theoretical one to make a cost study of what the per cent of increase in each account would be.

In any event there is no more basis for considering this traffic added traffic in the cases of the Texas & Pacific and the Louisiana Railway & Navigation Companies than in the case of the numerous other railway companies serving both the Texas ports and New Orleans. The desire of all of such lines to secure additional traffic, while natural and commendable is subject to the qualification that no provision of the Interstate Commerce Act be violated in so doing.

The foregoing is a full and complete answer to the contention of the Texas & Pacific that the orders of the Commission herein deprive it of its property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Commission has made a valid order based upon transportation conditions removing a prejudice against the Texas ports and a preference in favor of New Orleans. Due process is in no way denied the Texas & Pacific because were it able to ignore such violation of the law as found to exist it might increase its traffic. Such a contention was thoroughly considered and disregarded in *Virginian Railway* v. *United States et al., supra.* For the same reason there is no merit to the contention of the Texas & Pacific that the order of the Commission denies to it unlawfully the right to initiate and dictate its own rate policies. No one denies, least of all the Interstate Commerce Commission that a carrier has such right, but in initiating rates and rate policies it is equally obvious that a violation of any provision of the Interstate Commerce Act will not be permitted. Under Finding 27 of the *Consolidated Southwestern Cases*, heretofore referred to, the

Texas & Pacific Railway Company and the Louisiana Railway & Navigation Company are required in connection with a great body of their domestic rates to observe differentials as reflected by the mileage scales therein prescribed as to the majority of their stations or else participate in making similar changes in rates to other stations on their own and other lines of railroad. However, in connection with that case the Texas & Pacific and the Louisiana Railway & Navigation Companies have not contended in any court that the effect of such order is to deny them the use of their property or the protection of the Fourteenth Amendment of the Constitution.

VII.

THE ORDERS OF THE COMMISSION UNDER ATTACK IN THIS PROCEEDING WERE NOT ORDERS DESIGNED TO REGULATE INDUSTRY. THEY CONSTITUTE A PROPER EXERCISE OF THE COMMISSION'S JURISDICTION TO REGULATE RATES AND CHARGES OF CARRIERS AND ARE FOUNDED SOLELY ON TRANSPORTATION CONDITIONS.

Throughout all of the briefs of appellants the contention is presented that the orders of the Commission involved herein had for their purpose the overcoming of assumed commercial and economic advantages of the Louisiana ports and the diversion of tonnage from such ports to the Texas ports. This contention, which is essentially the same in all of the briefs, is stated at page 28 of the brief of the New Orleans Joint Traffic Bureau in the following language:

> "It is true that the orders issued by the Commission in the case at bar are in form directed to freight rates. It requires, however, no deep probing of the record to discover that, in substance, the orders confer upon the Texas ports an adjustment of export, import and coastwise rates more favorable than ob-

tains to the Louisiana ports for the primary purpose of offsetting the assumed commercial and economic advantages of New Orleans, and for the further purpose of placing an arbitrary barrier in the way of foreign commerce which might seek an outlet to the sea via the Louisiana ports."

That such theory is baseless is indicated by two important facts; first, the Commission expressly disclaims that it is seeking to regulate economic or commercial conditions or to equalize at one point the more favorable conditions existing at another; and, secondly, an analysis of what the Commission has actually done proves clearly that we have to deal solely with an order removing prejudice and that such order is founded wholly and solely on transportation conditions affecting transportation to the ports involved.

It should also be borne in mind that the contention of appellants that the orders of the Commission confer upon the Texas ports a rate adjustment more favorable than obtains to the Louisiana ports is absolutely in error. The facts are that the Commission found that the existing policy of complete equalization of the Louisiana ports with the Texas ports to and from the territory involved resulted in preference to the Louisiana ports and prejudice to the Texas ports. The effect of the orders of the Commission removing such prejudice is not to completely condemn equalization but to permit it in all cases where the distance to New Orleans is not more than 25 per cent greater to the Texas ports, and where such distance to New Orleans is greater than 25 per cent a basis of rates is permitted which produces much smaller differentials New Orleans over the Texas ports than would result from the application of distance scales prescribed by the Commission for domestic traffic in the Southwest. Therefore the Louisiana ports still have a relatively more favorable adjustment of export, import and coastwise traf-

fic than do the Texas ports. That fact should be borne constantly in mind when the assertion is made that the Commission has made certain orders favoring the Texas ports or intended to divert traffic to such ports. The fact is it has only partially lessened the rate disadvantages under which the Texas ports labor.

As to the disclaimer of the Commission that it was seeking to regulate economic or commercial conditions, which disclaimer must be accorded full weight unless the facts prove that it has done differently from what it has said it has done, in its first report herein, 100 I. C. C. 110, the Commission in discussing the equalization policy pursued generally by the carriers with regard to rates to and from New Orleans and the Texas ports, says (R. 3360):

> "New Orleans has certain natural advantages over Galveston which have affected the relationship of rates to the two ports. It is situated on the Mississippi River, at a natural division between, and terminus of, lines operating both east and west thereof. It therefore draws freight from both east and west of the river and by barge line down the river, which insures it not only a greater volume but a wider variety of freight than goes to Galveston, which is dependent upon the southwestern lines. This fact in itself warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages. While those natural advantages are entitled to consideration in so far as they have been brought about by geographical location, they are not entitled to much respect in so far as they have been brought about by rate advantages such as those here complained of. So far as the territory west of the Mississippi River, which we are here considering, is concerned, the difference between the natural advantages of New Orleans and Galveston is small. Both ports are natural objectives for export and coastwise freight originating in that territory. The Southern Pacific lines reach both ports and the Missouri Pacific system,

through control of the International-Great Northern and the Texas & Pacific, serves both ports. The policy of the southwestern carriers serving New Orleans, more particularly the Texas & Pacific, has been, generally speaking, to apply the Galveston rates to New Orleans on traffic moving from or to all points west of the Mississippi River, except points in Texas south of the Texas & Pacific. Such an adjustment necessarily disregards distance and commercial instead of natural advantages control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."

In the above quotation the Commission merely announces that where one point possesses certain natural advantages over another point such fact warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages, because, while such natural advantages are entitled to consideration in so far as they are brought about by geographical location, they are not entitled to respect in so far as they have been artificially created by rate advantages. The above quotation is no evidence of an intention of the Commission to regulate industry or manipulate a rate adjustment, or to control economic conditions by the manipulation of a rate adjustment.

Again at page 368 of its report on further hearing (R. 3391) the Commission, after enumerating certain commercial and economic advantages of New Orleans over the Texas ports, states:

"While such commercial advantages as are above enumerated cannot be determinative of rate relationships, and few of them can be taken into consideration in passing upon the question of undue prejudice, they serve to confirm the impression that the

advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior to those of the Texas ports that an affirmance of the findings in the original report would not be likely to cause serious injury to the port of New Orleans."

Again is there an express disclaimer by the Commission of any intention to consider commercial advantages as determinative of rate relationships.

Further on page 369 of its report on further hearing (R. 3391) the Commission says:

"Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade. Such a policy also encourages waste in rail transportation."

Again at page 387 of its report on further hearing (R. 3414) the Commission states:

"We have consistently declined to disrupt rate groupings, particularly where they have existed for many years, unless it was shown that the preference or prejudice which they involved resulted in substantial injury to complaining shippers or localities. The finding in such cases, where this has not been shown, has been that the preference or prejudice is not undue. In other words, we have not taken the initiative in requiring carriers to depart from the principle that every shipper or community is entitled to the advantages of its location, but where carriers have voluntarily departed therefrom and such departure has not caused substantial injury to any prejudiced party, we have not undertaken to interfere; and even where injury is shown, the preference or prejudice may, within limits, be

> justified by competition. *Maritime Asso., Boston Chamber of Commerce,* v. *A. A. R. R. Co., supra,* pages 565-567. But where it is shown that extensive grouping or port equalization, voluntarily maintained by the same carriers, without justification by competition, has disregarded substantial differences in distance and has resulted in substantial injury to shippers or localities, we have found such grouping or port equalization to be unlawful, and in the latter class of cases have prescribed reasonable rate differences. *Mobile Chamber of Commerce* v. *M. & O. R. R. Co.,* 57 I. C. C. 554; *Inland Empire Shippers' League* v. *Director General,* 59 I. C. C. 321."

The Commission, therefore, expressly disclaims any intention to regulate commerce or industry. It finds, however, intense competition between the Texas ports and New Orleans in the traffic here involved; that the carriers have generally, with some exceptions, carried equal rates to and from both sets of ports notwithstanding substantial differences in distance; and it finds testimony of Galveston interests that such equality of rates has caused them injury in their competition with New Orleans. Then at page 384 of its report (R. 3410) the Commission after pointing out that no witness seriously questions its finding first made in *Memphis-Southwestern Investigation,* 55 I. C. C. 515, 523, that transportation conditions throughout the territory involved were substantially the same, says:

> "With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers."

There is clearly, therefore, evidence of an intention not to equalize commercial or economic conditions, but to give to a prejudiced point rates based upon transpor-

tation conditions met in traffic to and from such prejudiced point as compared with traffic to and from the preferred point. In this connection it should be pointed out that Exhibit B-17, (Vol. VI, Reproduction of Stipulated Exhibits) indicates that the differentials prescribed for the differences in distance between the Texas ports and New Orleans are materially less than the differences in rates for similar different distances as prescribed in the *Consolidated Southwestern Cases*, and in other cases in which the Interstate Commerce Commission has prescribed mileage scales on commodities for application in southwestern territory. While the *Consolidated Southwestern scales* do not apply to export, import, and coastwise traffic, as such, in most cases domestic rates are the basic rates on export, import, and coastwise traffic. As one illustration of the showing made in that exhibit, page 3 thereof indicates that from stations Marshall to Sweetwater on the Texas & Pacific the average rate on green coffee would be 17.3 cents higher from New Orleans than from Galveston, and 21.4 cents higher from New Orleans than from Houston, whereas the differential required by the Commission in Docket 12798 is but 9 cents. This indicates clearly that the Commission in prescribing the differentials involved here has not accorded to the Texas ports the entire benefit of their geographical location nor in any way sought to equalize commercial or economic advantages. It is, of course, obvious that when dealing with competitive traffic any change lawfully required in such rates must have some effect upon commercial and economic conditions. That such is true in no way affects the power of the Commission to regulate such rates in accordance with the provisions of the Interstate Commerce Act.

In *Edward Hines Trustees* v. *United States*, 263 U. S. 143, plaintiff sought to annul an order of the Interstate

Commerce Commission requiring carriers to cancel certain penalty reconsignment charges, on the theory that such order hurt its business and was of advantage to certain competitors. At page 148 the court says:

> "Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection."

A similar contention that industry was being regulated was made in *Assigned Car Cases*, 274 U. S. 564. At page 583 in its opinion in that case the court said:

> "Equally unfounded is the contention that, under the guise of regulating carrier instrumentalities, the Commission is seeking to equalize industrial fortune and opportunty. The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service. * * * The contention is admittedly baseless if, as we have concluded, there is evidence to support the finding that the assigned-car practice causes discrimination in the use of other transportation facilities."

The above case is directly in point. In the instant case discrimination was found to exist and the yardstick used by the Commission in remedying the situation is clearly shown to be the relative cost of service of the traffic to and from the prejudiced and preferred points. That commerce and industry may be incidentally affected is without legal significance. The jurisdiction of the Commission was properly invoked, a violation of the law

found and its removal required by a formula based upon transportation conditions. The contention that the order of the Commission here is one designed to regulate industry and not transportation is groundless.

VIII.

THE ACTION OF THE INTERSTATE COMMERCE COMMISSION IN GRANTING FOURTH SECTION RELIEF CONSTITUTES NO PRECEDENT TO GUIDE ITS ACTIONS HERE. IN SO FAR AS FOURTH SECTION RELIEF TO CIRCUITOUS LINES TO MEET THE COMPETITION OF SHORT LINES IS CONCERNED, THE SITUATION IS IN NO SENSE ANALOGOUS; AND IN ANY CASE WHERE FOURTH SECTION RELIEF IS GRANTED IT MUST BE UPON A FINDING BY THE COMMISSION UPON THE FACTS BEFORE IT THAT SECTION 3 OF THE INTERSTATE COMMERCE ACT IS NOT VIOLATED.

In the Ninth Proposition at page 148 of the Texas & Pacific brief, and at pages 61 *et seq.* of the brief of the New Orleans Joint Traffic Bureau, it is contended that the orders of the Commission herein are arbitrary as is evidenced by the fact that the Commission has applied a different rule in this case than was applied by the Commission in the granting of fourth section relief in various cases.

In the first place, in those instances where fourth section relief is granted a circuitous line to meet the competition of a more direct route, the two situations are entirely different because there is involved in such case permission to carry the same rate for a greater distance than a shorter distance between common origins and common destinations, whereas in the proceeding before this court the Commission is dealing with rates from common origins or destinations to different points. In

the application of the same rate for a 600-mile distance as for a 400-mile distance to Galveston, that point is in no way affected. However, as the Commission found in these proceedings, Galveston was affected and injured by the carrying to or from a common point, New Orleans, the same rate for 600 miles as the same origin or destination for 400 miles.

In the New Orleans brief reference is made to *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.* 98 I. C. C. 183, covering rates upon cottonseed products, and *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.* 101 I. C. C. 116, covering rates upon grain and grain products. In those cases the Commission, upon the evidence before it, found that as a matter of fact the granting of fourth section relief therein would not result in undue prejudice to any intermediate point, whereas in these proceedings the Commission found, upon the evidence before it, that the carrying of the same rate to New Orleans for the longer distance as to the Texas ports for the shorter distance, resulted in prejudice to the Texas ports and preference of New Orleans. The finding of the Commission upon the facts before it in the cottonseed products and grain cases bears no relation to the finding of the Commission upon the facts before it in this case.

A further fallacy in the comparison of circuity permitted under the fourth section with the degree of circuity which should be permitted in making the same rates to different points is, that if the degree of circuity permitted in fourth section cases automatically establishes a rule for permitting the disregard of distance between competing points, this situation results. If the longer routes from a common point to Galveston are permitted to meet the intermediate routes up to a circuity of 50 per cent, and such percentage of circuity be-

comes proper in permitting the direct routes to meet at New Orleans the Galveston rate, then under the fourth section principle a further circuity must be permitted up to 50 per cent in allowing the longer routes to New Orleans to meet the shorter route to Galveston. Circuity is thus superimposed upon circuity. The two situations have nothing in common and neither forms any precedent for the other.

The fallacy of comparing permissible circuity under the fourth section with required differentials for different distances to competing points under Section 3 is illustrated at page 182 of the Texas & Pacific brief, wherein the distance from El Paso, Texas, to New Orleans via the Texas & Pacific of 1147 miles is compared with the distance via the Santa Fe from the same origin, El Paso, to Galveston, Texas, of 1144 miles, a difference of only three miles. The same page of this brief, however, shows that the Santa Fe constitutes a circuitous route from El Paso to Galveston, the short line distance being only 859 miles. The Commission has found that the failure to accord to Galveston rates representative of the shorter distance to it than to New Orleans upon a given formula results in prejudice. The only proper comparison, therefore, would be the short line distance from El Paso to Galveston as compared with the short line distance from El Paso to New Orleans. If these distances calculated upon a comparable basis represented a difference of but three miles the Texas & Pacific would be permitted to equalize the rate from El Paso to Galveston at New Orleans.

At page 64 of the New Orleans brief another class of fourth section cases is referred to, and there is cited *Export and Import Rates to and from South Atlantic and Gulf Ports,* 169 I. C. C. 13, where the Commission granted the direct line serving South Atlantic and Gulf

ports fourth section relief for the purpose of meeting at common points, such as Chicago, Ill., competition for import and export traffic moving through eastern and North Atlantic ports, and to maintain higher rates at intermediate points. In that case, however, the Commission found, upon the facts before it, that the maintenance of the rates prayed for would not result in preference and prejudice to the North Atlantic ports. At page 44 of the Commission's opinion it is stated:

> "There is no doubt that any increase in the movement of foreign commerce to and from the interior territory via the southern ports would be accompanied by a corresponding relative decrease in the movement through the northern ports. However, unless the rates which produce this result are unduly preferential or unduly prejudicial or otherwise in violation of law, or contrary to the general public interest, as expressed in the law, the fact that they may divert traffic from one port or group of ports to another is no bar to the granting of fourth-section relief."

In other words, the finding of fact of the Commission upon the record before it in that case has no relation to the finding of fact of the Commission upon the record before it in this case.

IX.

THE ORDERS OF THE COMMISSION HEREIN DO NOT CONSTITUTE A PREFERENCE OF THE PORTS OF ONE STATE OVER THOSE OF ANOTHER CONTRARY TO SECTION 9 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

The contention is presented in the Seventh Proposition at page 145 of the Texas & Pacific brief, in Part VI, page 48, of the brief of the State of Louisiana, and throughout the brief of the Board of Commissioners of the Port of New Orleans, that the orders of the Com-

mission under review constitute a preference of the ports of one state over those of another state contrary to Section 9 of Article I of the Constitution of the United States. That part of Section 9 of Article I of the Constitution relied upon is as follows:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

In the 1927 report of the Commission it properly disposes of this argument in the following language:

> "The Texas & Pacific contends that the establishment of differentials against New Orleans and in favor of the Texas ports would violate both the letter and spirit of the constitutional prohibition against preference by any regulation of commerce to the ports of one State over those of another. In *Armour Packing Co.* v. *United States*, 209 U. S. 56, the Supreme Court, in referring to this provision of the Constitution, said:
>
> 'The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another, cannot be construed as a violation of this constitutional provision.'
>
> In dealing with a similar contention in *Maritime Asso., Boston Chamber of Commerce*, v. *A. A. R. R. Co.* 95 I. C. C. 539, we said at page 542:
>
> 'The complaints are brought under the interstate commerce act and invoke exercise of powers thereby delegated to us by Congress under the commerce clause of the Constitution. Clause 3, Section 8, Article I. As an agency of Congress we must assume that in laying statutory duties upon us it has not transcended its powers.' "

The fallacy of this argument is further demonstrated in the following language of the court below (*Texas & Pacific Ry. Co.* v. *United States*, 42 Fed. (2d) 281, 284):

> "Of these three contentions it is sufficient to say of the first, that the invocation of section 9, art. I, to prevent a merely incidental result upon the ports of a state of an act or regulation of the Commission has never received the sanction of the courts,

> and further, that since the orders of the Commission are based upon its findings that the prohibited rates constitute an unjust preference of the Louisiana ports over the Texas ports, it follows that if the order is supported by evidence the order does not give, but, in fact, prohibits a preference of the ports of one state over those of another; while if the finding is unsupported by the evidence, the order will fall not because it effects a preference of one port over another, but because the facts which authorize the exertion of the power are wanting."

A very complete history of the enactment of this constitutional provision is contained in the brief of the Board of Commissioners of the Port of New Orleans, and this history clearly demonstrates that in the minds of the framers of such provision there was solely the question of regulations regarding the clearing and entry of ships at the various ports. (See particularly Mr. Luther Martin's letters reproduced at pages 8 and 9 of that brief.)

Were Section 9 of Article I of the Constitution to be given the effect sought the Commission would be divested of all power to remove discriminations in the railroad rate adjustment to and from the various ports in the United States. By paragraph 3 of Section 8 of Article I of the Constitution, Congress is given power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and the Commission is but an arm of Congress executing that power through the instrumentality of the Interstate Commerce Act. By Section 1 of that act, pursuant and in full harmony with the constitutional grant of power, the provisions of that act are extended to the transportation of property "from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States." Therefore all of the provisions

of the Interstate Commerce Act as to reasonableness of rates, the removal of discriminations, prejudices and preferences, are extended to the inland railroad haul of that part of the foreign commerce of the United States. Were that not so the Commission and Congress would be divested of all control of railroad rates to and from the various ports of the United States, in so far as those rates were applicable on traffic moving to or from foreign countries.

The obvious defect in the argument of appellants is, however, that as a matter of fact no preference has been given by the orders of the Interstate Commerce Commission to the Texas ports over the port of New Orleans. To the contrary, the Commission has found in a proceeding in which it has proper jurisdiction, that the port of New Orleans had an actual preference in railroad rates applicable to export, import and coastwise traffic, and by its orders the Commission has merely required the partial removal of that preference. New Orleans still has to a lesser extent a preferential rate adjustment in its competition with the Texas ports, because under the orders of the Commission in all cases where the distance to New Orleans is not in excess of 25 per cent greater than the distance to the Texas ports transportation conditions may be ignored and the rates equalized, and even where the distance to New Orleans is in excess of 25 per cent greater than to the Texas ports the rate differences are not as of as great volume as would be reflected were the domestic rates prescribed by the Commission for application in the general territory applied to both sets of ports.

If the contention of appellants be correct and rates to and from the various ports can not be adjusted upon the basis of the transportation conditions applying upon the traffic to such ports, then the requirement of Section

9 of Article I of the Constitution can only be met by equal rates between any given common point and every port of entry or exit in the continental United States. The same rate in cents per hundred pounds would have to be maintained from a point in California for a transcontinental haul to the port of New York as was currently applied from an origin in New Jersey, but a few miles distance from the port of New York.

Conclusion.

The orders of the Interstate Commerce Commission involved in this proceeding are supported by substantial evidence of record, are within the power of the Commission to make, and the decree of the lower court dismissing the petitions for injunction should be affirmed. The Texas and Pacific Railway Company and the Louisiana Railway & Navigation Companies, participating in rates to both the preferred and prejudiced points, are therefore guilty of the prejudice and preference found by the Commission and its orders properly apply to them. As to whether or not the rate structure assailed created a preference of New Orleans and a prejudice of the Texas ports, this court is asked to substitute its judgment upon the voluminous evidence of record for that of the Commission. It is the settled law here that findings of fact of the Commission supported by substantial evidence of record are not subject to review.

Respectfully submitted,

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No. 24.

IN THE

Supreme Court of the United States

October Term, 1931.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees.*

BRIEF.

On Behalf of Galveston Chamber of Commerce, Galveston Cotton Exchange and Board of Trade, Houston Chamber of Commerce, Navigation & Canal Commissioners of Harris County, Houston Ship Channel Navigation District of Harris County, Texas, Beaumont Chamber of Commerce, Beaumont Dock & Wharf Commission, Port Arthur Chamber of Commerce & Shipping, Orange Chamber of Commerce, Texas City Board of Trade, The Cooper Grocery Company, The Shear Coffee Company, Waco Coffee Company, Inc., Waco Chamber of Commerce and the State of Texas, Interveners.

STATEMENT.

The above named interveners were complainants or interveners in support of complainants in the proceedings before the Interstate Commerce Commission, and are here opposing the efforts of peti-

tioners to have this Honorable Court restrain, set aside and annul three orders of the Interstate Commerce Commission in Cause No. 12798, on its docket, and likewise an order of said Commission in Cause No. 20685 on its docket.

It will not be the purpose of interveners to answer in this brief all of the assignments relied upon by appellants. These interveners rely upon and adopt the brief filed herein by the appellees and the purpose of this brief is to supplement some of the points discussed in the brief of appellees.

In this case the Texas and Pacific Railway Company and the Louisiana & Arkansas Railway System, joined by intervening New Orleans shipping interests, have sought to enjoin orders of the Commission resulting from three extensive hearings in the course of which the voluminous record now before this court was collected. Following each hearing the Commission prepared a careful report setting out the contentions of the various parties, the facts it deemed essential, and its views as to the law applicable, and upon such reports entered the orders here complained of.[1]

In each of the reports the Commission sustained the contention of the Texas complainants that the rates for the transportation of certain specified commodities in export, import and coastwise movement between the territory west of the Mississippi River and Illinois and the Gulf ports were unduly prejudicial to the Texas ports and unduly preferential of New Orleans. The outstanding orders of the Commission require the respondent carriers "according

[1] The decisions of the Commission are found at 100 I. C. C. 110, 128 I. C. C. 349; and 160 I. C. C. 345, and at pages 3346, 3367, and 3438 of the record herein.

as they participate in the transportation" to remove that undue prejudice and preference: (1) by equalizing the rates to Galveston with those to New Orleans from points in Southwestern Louisiana, Arkansas, Texas, Oklahoma and Kansas, south of the line of the Union Pacific, the distances from which to New Orleans are not more than 25 per cent in excess of that to Galveston; and (2) by maintaining rates to the Texas ports lower by certain minimum differentials to and from points in the described territory where the short line distances to New Orleans exceed those to Galveston by more than 25 per cent.[2]

In other words, the orders of the Interstate Commerce Commission leave the rates to New Orleans lower than the rates to the Texas Ports from all points in the interior where the distance to New Orleans is less than to the Texas Ports; they leave the rates to New Orleans the same as the rates to the Texas Ports where the distance to New Orleans is the same as to the Texas Ports; and they also leave the rates to New Orleans the same as to the Texas Ports where the distance to New Orleans exceeds that to Galveston by 25 per cent or less. To state the matter differently, although the Interstate Commerce Commission found that traffic and transportation conditions were substantially the same throughout the territory involved in the investigation, it found that the preference in favor of New Orleans and the prejudice against the Texas ports was not

[2] The 1925 order required differentials for all hauls to New Orleans exceeding those to Galveston by 100 miles, but upon the representation of the New Orleans interests this provision was altered to the percentage basis above described by the 1927 order. The 1927 order exempted points on the Texas & Pacific and the Louisiana Railway & Navigation System, the appellants here, from the territory specified, but this exemption was eliminated by the 1929 order.

undue except in those cases where the difference in distance and consequent service and cost, in favor of the Texas ports was greater than 25 per cent.

The commodities covered and the differentials to be maintained from points on the lines of appellant carriers,[1] which are 25 per cent further to New Orleans, are as follows:

Commodities in Export or Coastwise Movement:[2]	Differential (Per 100 lbs.)
Grain and Grain products	2 cents
Asphalt	3 "
Cotton factory products and related articles	12 "
Cottonseed and peanut cake and meal	5 "
Cottonseed and peanut oil	6 "
Packinghouse products and related articles except soap	8 "
Soap	6 "
Turpentine and related articles	6 "
Commodities in Import and Coastwise Movement:	
Bagging (cotton-bale covering), cotton-bale ties, and buckles	6 "
Green coffee	9 "

In its 1927 order the Commission specified roughly the line of the territory from which the differentials should be applied. An immediate appreciation of

[1] To points in Oklahoma and Kansas not served directly by appellant carries the differentials are materially lower. For instance the differential on grain becomes one cent.

[2] Petroleum products were included in the first or 1925 order but were eliminated from the 1927 order on the ground that the maintenance of equal rates was not causing any substantial injury to the Texas ports.

the geographical situation can be gained from the map designated Exhibit B-1 found in Vol. VI of the record.

The attack in this case is directed to the requirement that the above minimum differentials be maintained, there being no complaint regarding equalized territory.

QUESTIONS PRESENTED.

For a concise statement of the questions presented by this case, reference is made to page 2 of the brief on behalf of the United States.

STATUTES INVOLVED.

In addition to the statutes recited at pages 4 to 10 of the government brief, it is urged by these interveners that the first paragraph of Section 500 of the Transportation Act, 1920 (41 Stat. 499, Chap. 91 U. S. C. title 49, Section 142) is pertinent hereto:

> "Section 500. It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

SUMMARY OF ARGUMENT.

1. Since the order of the Commission in the *Grain Case*, 164 I. C. C. 619, requires the observance of the differentials attacked here, nullification of the Commission's order in this case would not relieve the appellant carriers from the necessity of maintaining the required differentials. The case is, therefore, moot

so far as grain is concerned. *United States v. Anchor Coal Co.*, 279 U. S. 812.

2. All parties before the Commission agreed that a policy of equalization of rates regardless of distance became discriminatory at some point or another. After considering the testimony of the many expert witnesses on behalf of all concerned as to where the line should be drawn, the Commission found that where distances were more than 25 per cent greater equalized rates resulted in prejudice to the Texas ports and preference to New Orleans. In attacking this finding appellants, in effect, ask the court to substitute its judgment as to the point at which a discrimination becomes undue.

3. The orders of the Commission are supported by substantial evidence. The Commission found, and its findings are supported by substantial evidence that the distances to New Orleans were materially in excess of those to Texas ports; that the service given to New Orleans and its exporters and importers, and the cost thereof, was correspondingly greater; and that the action of appellant carriers in ignoring the difference in distance and the extent and cost of service diverted to New Orleans and its shippers, traffic and business which under an observance of the transportation standard, would have gone to the Texas ports and shippers, to the substantial injury of the Texas ports and shippers.

4. The rates before the Commission are those to or from the port as *origin* or *destination*, and in determining whether such rates are lawful, under Section 3, it is not required to give *controlling* consideration to the water rates beyond the ports or the sum of the inland rail rates and the water rates nor to the

fact that there is competition via the rail-water routes through the respective ports. Nevertheless, the Commission gave effective consideration to the fact that there was a water movement beyond the ports on the traffic involved here and recognized in the rates prescribed that there are competitive routes through the respective ports. Its reports show that it considered such factors and this was testified to by the chief traffic official of the Texas & Pacific who verified the complaint in this case. The departures it permits the New Orleans carriers to make from the domestic rates, which are based on the extent and cost of service, show how great weight was given to competition and the water movement beyond the ports. This court will not itself determine how much weight should be given to a specific factor since Congress has confided that question to the administrative judgment of the Commission.

4. Participation by the appellant carriers in the rates for the transportation of the specified commodities in export, import, and coastwise traffic which unduly prefer New Orleans and unduly prejudice the Texas ports is sufficient legal basis for the order under Section 3 directing them to remove the undue prejudice and preference. The appellant carriers are free to relieve themselves from the charge of violating Section 3 either by raising their rates to and from New Orleans or by withdrawing from their participation in the import, export and coastwise rates to the Texas ports. While such an alternative is in fact available to them, all that is necessary as a matter of law to support the order is that they participate in the rates which cause the discrimination and that they have it within their power to remove it, which

they admittedly do, by raising the rates to New Orleans.

5. The Commission has not attempted to regulate commercial conditions or to counteract the natural advantages of New Orleans under the guise of regulating rates, but has simply required the carriers to refrain from adding to the commercial and natural advantages of New Orleans *the artificial and unlawful advantage of preferential rates.*

6. That the Commission may reach a different conclusion with respect to equalization of rates on one commodity than it does on another does not warrant this court in substituting its judgment for that of the Commission, nor is such action arbitrary in view of the different competitive and traffic conditions affecting the various commodities; nor is the judgment exercised by the Commission in granting relief to the carriers under the Fourth Section in other cases any legal ground to enjoin its exercise of judgment under Section Three in the present case.

7. Under the policy laid down by Congress in Section 500 of the Transportation Act the Commission is empowered to protect and preserve the commerce through the Texas ports, and its order herein is entered in pursuance of the policy enjoined upon it.

8. The order of the Commission in Docket 20865 is supported by substantial findings and evidence, and appellant carriers can be required to remove the undue prejudice and preference there condemned.

In So Far as it Involves the Rates on Grain this Case Has Been Rendered Moot by the Order of the Commission in the Grain Case.

Since the filing of this suit in the lower court the Commission has entered its order in Docket No. 17000, *Rate Structure Investigation, Part VII, Grain and Grain Products Within Western District and For Export*, 164 I. C. C. 619, in which it prescribed a rate level on grain and grain products within the Western District and for export. Regarding the Galveston-New Orleans differentials it said, referring to its report in the instant case at 128 I. C. C. 349:

> "The finding in the report on further hearing is adhered to, subject to the modification that the territory from which there is to be no differential will be on and north of the line of the Rock Island westward through Hutchinson and Liberal instead of north of that line."

This finding has the effect of modifying to the extent stated the 1927 order of the Commission involved here. It is incorporated in the order in that case so that even if the orders here were enjoined carriers would be bound by the *Grain Case* order as to differentials on grain. The order in the *Grain Case* was attacked before a three judge court in Chicago on the ground principally that the level prescribed was too low, but was sustained by that court and is now pending here on appeal. *Atchison, Topeka & Santa Fe Railway et al. v. United States*, No. 287. It does not appear that there is any contention in that case that the Galveston-New Orleans differentials were illegally prescribed.

It is respectfully submitted that this case is moot

insofar as the differentials on grain are concerned and the appeal in that respect should be dismissed without regard to the contentions raised by appellants. *United States v. Anchor Coal Co.*, 279 U. S. 812, and cases there cited.

Appellants Are Asking the Court to Substitute Its Judgment for that of the Commission as to the Point at Which a Discrimination Becomes Undue.

While there was some controversy before the Commission as to whether the appellant carriers could be liable for undue prejudice to the Texas ports as a matter of law, there was no disagreement among the many expert witnesses testifying on behalf of the various parties that at some point or another there was a limit beyond which the carriers could not go in ignoring the difference in distance to the respective ports. As to where this line should be drawn there was much difference of opinion, but there was no disagreement as to the fact that it should be drawn at some point or another.

It was originally urged by complainants that there was a limit beyond which carriers should not be permitted to go and that where this line of demarcation is, was for the Commission to decide. (Witness Thornton, Record 1858; Witness Haines, Record 451 and 457) Mr. Moulton, the chief witness on behalf of the New Orleans shippers, testified that as a general proposition the rates south of a line through Waco and Corsicana should not be equalized. (R. 820) Mr. Rhett, a witness for the New Orleans lines, testified that there is a limit at which he did not think the carriers should be required or permitted to equalize. (R. 476) Witness Lallande, a carrier witness

favoring equalization, testified he thought such a line should be placed 200 miles from the ports. (R. 482, 485)

Mr. Leffingwell, representing the Texas Chamber of Commerce and the Texas Industrial Traffic League, testified that the line must be drawn somewhere and suggested it might be properly based on a difference in distance of 25 per cent. (R. 607, 608, 612) In the second hearing he testified that the Texas Industrial Traffic League felt that there should be a differential relationship although there was some difference of opinion as to whether the line should be drawn at differences of 100 miles or more, that being a matter of judgment. (R. 1633) Mr. Booth, traffic manager of the International & Great Northern, testified that where there is a difference of more than 100 miles in a haul of 400 or 500 miles there should be a differential (Record 638). Witness Garvin, General Freight Agent of the Missouri, Kansas & Texas Railway, testified that there ought to be a differential when the difference in distance was over 100 miles (Record 616).

Witness Talley, Traffic Manager of the New Orleans Refining Company, testified that the line should be drawn about 200 miles from the ports. (Record 521) Witness Ermon, Traffic Manager of the Southern Cotton Oil Company and representative of numerous cottonseed oil shippers, recommended differentials at points less than 200 miles from the nearest port (Record 562), admitting that port equalization could be carried too far and that the line had to be drawn somewhere. (Record 575)

C. C. P. Rausch, Assistant Freight Traffic Manager of The Missouri Pacific Railroad, testified that the

nearest port might consistently have the benefit of its location for hauls shorter than 300 or 400 miles. (Record 1075, 1114) He suggested that possibly the Louisiana-Arkansas line or the Red River might be the dividing line between differential and equalized territory (Record 1115), and concluded that "distance should be given whatever consideration the Commission wants to give it in connection with the making of rates in this proceeding after listening to what everybody has to say." (R. 1128) Incidentally that is what the Commission did.

R. G. Cobb, Traffic Manager of the Mobile, Alabama, Chamber of Commerce testified that (Record 1577):

> "Our interest in this matter is mainly one of port equalization. As we are not a complainant, we would naturally prefer to see the present adjustment of export rates to Mobile continued, but we realize that *cost of service must be considered in these as well as other rates, and that one of the dominant factors in this cost is mileage.*"

This same witness suggested that the lines should be drawn approximately 500 miles from the ports, and that there should be equalization beyond that point unless the difference in distance was as much as 25 per cent. (Record 1579-80)

All of the witnesses above mentioned qualified as expert witnesses on traffic and transportation matters and were therefore qualified to express legally competent opinions.

Practically every one of the many expert witnesses testifying on the subject agreed that there was a line

beyond which it would be wholly improper to require or permit the equalization of points situated at differing distances to or from a common origin or destination. Since there is a point, or line, beyond which it is unreasonable to maintain the same rate for services of varying amounts, the determination of that line has been entrusted to the judgment of the Interstate Commerce Commission, and it has, based upon the varying views of the many experts testifying before it on behalf of all the parties hereto and upon the evidence presented to it, determined that in the rates to the respective ports some recognition must be accorded to differences in distance as great as twenty-five per cent and the resulting differences in the extent and cost of service.

The Orders of the Commission Are Supported by Substantial Evidence.

The position of appellants in this case is somewhat novel. Their assignments challenge the orders of the Commission on the ground that they are not supported by substantial evidence. In the presentation of their brief they take the position that the underlying findings of fact are not challenged but that the finding of undue preference and undue prejudice is not supported by the basic findings nor the evidence in the case. They apparently have concluded that it is useless to contend in the face of the voluminous record, which covers every factor any one could consider relevant, that the evidence does not support the basic findings of the Commission for at page 44 of appellants' brief they state:

> "Fundamentally, it is the position of appellants herein that the orders of the Commission

> under review, as well as the Commission's ultimate finding of undue preference and prejudice, are not only unsupported by but are directly in conflict with its primary or basic findings of fact, and that this Court will not find it necessary, at least to any appreciable extent, to look beyond the primary findings of fact to be found in the respective reports of the Commission."

The reproof administered to the lower court at pages 256-260 of its brief, in which it is argued that the court could not have examined the record in the six weeks elapsing between the oral argument and the decision, seems rather inconsistent with this position, but we confidently assert that evidence, and very substantial evidence can be found in the record to support every finding of the Interstate Commerce Commission in a few days time and that by use of the references given in the briefs of the respective parties it would not take long to reach the conclusion that the Commission had substantial evidence before it. Of course, it would be quite a different matter were the court to undertake to weigh the evidence and substitute its findings for those of the Commission, but this is clearly outside its province.

In the brief on behalf of the New Orleans Joint Traffic Bureau a similar position is assumed as appears from the following language from page 55:

> "We are not asking that the court explore in detail the voluminous record in the case at bar and then exercise its independent judgment as to whether or not there is some evidence which supports the findings of the Commission."

Appellants admit that there is a discrimination but contend it is not undue. In view of the settled rule

that a finding that a discrimination is unjust is a finding of fact confided by Congress to the judgment of the Commission (*Manufacturers R. Co. v. United States,* 246 U. S. 457), this position becomes that no substantial facts are recited in the reports of the Commission which would support the finding that the admitted discrimination was undue. Whether some other recited fact points the other way is irrelevant in so far as the action of this court is concerned. The burden of appellants in this contention is therefore extremely heavy, particularly in the light of the extensive reports of the Commission. As we shall show below, the finding of undue prejudice and preference is fully supported by the reports of the Commission and by the evidence of record.

1. DISTANCES TO THE RESPECTIVE PORTS.[1]

In its first report the Commission summarizes the showing regarding distances and rates to New Orleans and Galveston as follows (Record 3359):

[1] The importance of distance as a factor in the economics of rate making is emphasized by Messrs. Vanderblue and Burgess in *Railroads-Rates-Service-Management*, the MacMillan Company, 1924, as the following paragraphs from pages 139 and 121 respectively show:

> "The distance which goods or passengers are transported measures railroad service. Passenger rates are almost exclusively built upon the principle that rates should increase with distance. The mile transported is the unit of charge. Non-competitive freight rates are usually established in general conformity to the same principle; competitive freights may be. Not only is the service performed greater, but the total costs incurred are greater as the distance increases. This additional service means that investment has been made in roadbed and permanent way, and that additional outlays for operating expense (the costs of way and equipment and of conducting transportation) must be incurred for its performance. It is a sound principle that the goods or persons which occasion the expense should (in so far as what the traffic will bear will permit) contribute to meeting that expense. Any other policy must throw a burden upon other users of the railroad, or upon the owners. The economic effects would be as

"Analysis of the comparisons in the appendix shows, for example, that for a difference in average distance of 278 miles in favor of Galveston the average rate to ship side on sacked grain and flour from points in Texas on the Texas & Pacific, the Gulf, Texas & Western, the Kansas City, (fol. 520li-12) Mexico & Orient, the Roscoe, Snyder & Pacific, and the Abilene & Southern is 1.1 cents less to New Orleans than to Galveston. From Oklahoma for an average difference in distance of 189 miles the rate to New Orleans is 0.5 cent on flour and 1 cent on grain less to Galveston than to New Orleans. On cottonseed cake and meal from the 80 per cent group in northeastern Texas the rate to New Orleans is 1.8 cents less than to Galveston, although the average distance favors Galveston by 203 miles. From Oklahoma the average distance favors Galveston by 189 miles, and the average rate to New Orleans is 1.7 cents less than to Galveston. On bagging the rate to Little Rock, Ark., is 12 cents higher from Galveston than from New Orleans, although the distance is only 23 miles greater. To Alexandria, La., the difference in rate on bagging is 30 cents in favor of New Orleans, while the distance favors New Orleans by only 18 miles. These illus-

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though a subsidy had been paid. A *prima facie* case, then, can be made for rates based upon distance."

"It is the issue of 'local' discrimination, then, which has been very generally raised before the Interstate Commerce Commission where rate readjustments, as distinguished from classification readjustments, have been sought. From the nature of the case, the reasonableness of rates is extremely difficult to measure. But local discrimination can be tested by the simple yardstick of distance, and at least a *prima facie* case made upon this basis. The Interstate Commerce Act does not, it must be remembered, condemn all discriminations between business men in different sections or towns. It condemns only such discriminations as are undue. When the conditions governing the transportation service are substantially similar, there is at least a presumption in favor of equalization; where these conditions are substantially dissimilar, the differences in rates should measure, as accurately as may be, the differences in circumstances. Otherwise undue preference or discrimination must result."

trations are typical of many others shown of record."

The appendix referred to is found at page 3364 of the record, and shows the material differences in distance and in the relief the Galveston complainants sought and the relief the Commission allowed. For instance on grain from points on carriers serving the grain producing territory, other than the Santa Fe which voluntarily maintained differentials, it was 682 miles to New Orleans and 404 miles to Galveston, a difference of 278 miles for which complainants sought a 7 cent differential and obtained 2 cents. On bagging and ties the rates to Texas common point territory from New Orleans were actually lower than from Galveston although the distance was almost twice as great.

In the second report the Commission again summarized the variation in distance to the ports as follows (Record 3376-7):

> "The pertinent exhibits have been analyzed and the average differences in distance from representative interior points, as nearly as they can be determined upon this record, are as follows:
>
> From southern Kansas to New Orleans 898 miles, to Galveston 755 miles, difference 143 miles; excluding points in equalized territory, 930 and 768 miles, respectively, difference 162 miles.
>
> From Oklahoma to New Orleans 691 miles, to Galveston 545 miles, difference 146 miles; excluding points in equalized territory, 720 and 546 miles, respectively, difference 174 miles.
>
> From northern Texas to New Orleans 644 miles, to Galveston 444 miles, difference 200

> miles; excluding points in equalized territory, 670 and 457 miles, difference 213 miles."

"Equalized territory" as used in the above quotation included only points which were less than 100 miles more distant from New Orleans than Galveston. That territory was considerably extended, or stated conversely, differential territory was considerably restricted, in the second decision, so that the differences in distance from differential territory are considerably greater than those stated.

At page 3378 of the record appears the statement:

> "Instances appear in which the average differences in distance over all routes from particular points is as much as 350 miles, New Orleans over Galveston."

2. TRANSPORTATION CONDITIONS.

The Commission found, in its various reports, and it is not denied, that transportation conditions were substantially similar throughout the territory as the following excerpt shows:

> "No witness seriously questioned the finding, first made in *Memphis-Southwestern Investigation*, 55 I. C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same. The transportation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to." (Record 3410)

Apparently there was no controversy in the record regarding the substantial similarity of transportation

conditions throughout the Southwest. At pages 295 and 1895 Witness Thornton refers to findings of the Commission in various cases as to the substantial similarity of transportation and traffic conditions and to recognition of this fact by railroad officials. Witness Moulton for the New Orleans Joint Traffic Bureau makes a similar statement at page 649 and refers to it again at page 659. Witness Payne for the Texas & Pacific at page 933 likewise referred to the various findings of similarity. Witness Bothwell for the Santa Fe makes a similar statement at page 3089. Witness Waggener representing the Texas & Pacific at page 3274 testified that conditions were not radically different from Ft. Worth and Dallas to New Orleans and to the Texas ports. Witness Haines, representing Houston, testified transportation conditions were substantially the same in Texas, Arkansas and Oklahoma.

3. SERVICE AND COST.

That the service given and the costs of carrying the traffic to and from New Orleans are considerably in excess of that involved to the Texas ports is also demonstrated by findings of the Commission in its various reports:

> "With these findings [i. e. similarity of transportation conditions] as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers." (Record 3410)

> "These and other exhibits point to the conclusion that differences in lengths of haul considered, and without comparing special services on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans or the other Louisiana ports as it does over the Gulf, Colorado & Santa Fe or the M-K-T to Galveston or any of the other Texas ports." (Record 3411)

The foregoing finding was challenged by the Texas & Pacific in the third hearing which attempted to show that its out-of-pocket costs to New Orleans were lower than those of the Texas port carriers. The weight of evidence in that respect, however, was discounted by the Commission as the following language shows:

> "Without further data in support of these estimates the computations referred to are not convincing, but even if they were acceptable for the purpose intended, they compare improperly the system costs on both northbound and southbound traffic on the Texas lines with the costs on eastbound traffic only on the Louisiana division of the Texas & Pacific, on which division operating conditions are more favorable than on the lines of that carrier as a whole. No cost data for westbound traffic, with which this case is also concerned, were offered. What has just been said with respect to out-of-pocket costs on the Texas & Pacific applies also to somewhat similar data offered by the Louisiana Railway & Navigation system. The percentage of engine utility westbound on the Texas & Pacific, this carrier contends, indicates that additional tonnage in its present trains could also be handled in that direction, but it offered no figures to show that it could handle such additional tonnage any cheaper

than the Texas lines, which could also handle additional tonnage in their present trains from and to the ports served by them.

In the previous report it appears that the average operating costs, freight proportion, per 1,000 gross-ton-miles and per 1,000 revenue ton-miles, for the Texas & Pacific in 1923 and 1924, the latest years for which figures were available, exceeded those of the Santa Fe, the Missouri-Kansas-Texas, and the M-K-T. of Texas, except that in 1923 the figure for the latter carrier exceeded that of the Texas & Pacific. Corresponding data for later years were not offered at the recent hearing, and the foregoing figures are uncontradicted. The Texas & Pacific points out that its earnings per mile of line are equal to or greater than those of the Texas lines, from which it argues that the differences in cost in favor of the Texas lines are attributable to the fact that a larger proportion of its tonnage consists of high-grade traffic. The commodities or groups of commodities upon which differentials were prescribed in the previous report, however, can hardly be classed as high-grade traffic, and the record does not show that the earnings per mile of line on the commodities here concerned are any greater, or even as great, on the Texas & Pacific than on the Texas lines." (Record 3449)

4. INJURY TO THE TEXAS PORTS.

In view of the statements contained in the petition instituting this proceeding it is impossible for the appellants to maintain the position that the equalization of the rates to New Orleans with those to the Texas ports without regard to the extent or cost of service does not result in substantial injury to the Texas ports. In their petition in Equity No.

186, pages 29-30 (Record 33-34) the Texas & Pacific alleges:

> *"The inevitable effect of the enforcement of the Commission's aforesaid orders* that the carriers named therein (including your petitioner) shall publish and observe rates to and from Galveston on export, import, and coastwise traffic, with respect to the commodities named therein that are lower, by certain specified differentials, than the corresponding and contemporaneous rates to and from the port of New Orleans on such commodities moving in export, import and coastwise traffic, *will be to divert the movement of such traffic* from the rails of your petitioner, and *from the port of New Orleans*, to the rails of competing lines of railway serving the Port of Galveston and the other Texas Ports, and *to said Port of Galveston and other Texas Ports."* * * * (Italics ours)

The petitioners in Equity No. 187, at pages 32-33 of their petition, (Record 128) make similar allegations, and these allegations are adopted by the New Orleans interveners at page 7 of their petition. (Record 268)

In view of these allegations it is difficult to see any reasonable basis for the contention that the Texas Ports are not directly injured by the so-called "equalization" of New Orleans with the Texas Ports. The petitioners consider that they would be "irreparably injured" by the diversion of traffic from New Orleans to the Texas Ports which, they allege, would ensue as the proximate result of the establishment of the differentials. Obviously, if the establishment of the differentials would cause the diversion of business from New Orleans to the Texas Ports, the contrary is true and that the so-called

"equalization" of rates causes business to move to and from New Orleans rather than to and from the Texas Ports, with resultant "irreparable injury" or at least substantial injury to the Texas Ports.

That the action of the carriers maintaining equal rates to New Orleans for service materially greater in extent and costing materially more resulted in substantial injury to Galveston and other Texas ports in so far as the commodities here involved are concerned is further supported by the findings of the Commission and the evidence of record.

That the so-called equalization resulted in diversion of traffic to New Orleans which would otherwise move through the Texas ports is apparent from the finding of the Commission in its 1927 report which is as follows:

> "The testimony leaves little doubt that the differentials prescribed in the original report,[1] or even smaller differentials on most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans. On several of the commodities, however, green coffee, for instance, the movement that would be diverted from New Orleans would probably be small. The establishment of differentials would seem more certain to divert from New Orleans practically all of the movement of grain and grain products and petroleum and petroleum products originating in differential territory than of any of the other commodities." (Record 3388)

[1] Under the reduced differentials it is not contended that all the traffic will move through the Texas ports, but a larger share undoubtedly will. On this point see page 61 *infra*.

This same language is quoted on page 66 of the brief of the Texas & Pacific to show that the differentials prescribed would result in diverting traffic which New Orleans now secures (because the carriers ignore service and cost) to the complaining ports. As a matter of fact the whole discussion from pages 60 to 71 of that brief devoted to showing the effect of the prescribed differentials on the Texas & Pacific points to the conclusion that, except for its action in equalizing rates without reference to service or cost, a larger part of the traffic would move through the Texas ports.

In its first report (Record 3360) the Commission states:

> "We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but *where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered,* a line must be found beyond which distance may not be disregarded."

Further findings as to the damage resulting to the Texas port is found in the second report beginning at page 3389 of the record:

> "The character and frequency of the steamship service from or to any port is generally determined by the character of the traffic flowing through that port. The greater the variety of the commerce the greater the number of foreign ports that will be touched by the steamship lines serving the port, and the greater the number of ports for which commerce is handled the greater

the number of steamship lines that will serve that port and the more frequent the sailings therefrom. An exhibit shows that of 452 commodities or groups of commodities moved through Gulf ports in 1924, the latest year for which statistics were available, New Orleans handled 389 in export and 168 in import movement, Galveston 196 export and 120 import, and the Sabine ports 226 export and 27 import. Complainant states that many of the commodities which constitute what is termed general cargo for vessels are produced or consumed in the affected territory in sufficient volume to afford the Texas ports a variety of commerce sufficient to attract steamship service, but that these commodities will not move to the Texas ports in substantial quantities unless they are given the benefit of a rate differential under New Orleans. Many instances were cited by witnesses for complainant in which export business from points in the affected territory was lost to the Texas ports because of the better and more frequent steamship service at New Orleans, even though the rail haul was shorter to the Texas ports than to New Orleans and the rate was the same. Exporters and importers testified that they would not locate at any of the (fol. 520lk-19) Texas ports under an equalization of rates with New Orleans, and at least in one instance an importer abandoned a Texas port and moved to New Orleans, even though the ports were equalized, because of the superior advantages offered by the latter port."

And again at page 3391:

"There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect *of strengthening unduly, at the expense of others,* those ports which

by reason of natural or acquired advantages have attained commanding positions in the export and import trade."

The finding that the preferential rates maintained by appellant carriers resulted in injury to the Texas ports is, of course, a finding of fact which will be accepted by this court unless there is no substantial evidence to support it. That there is such substantial evidence this court can easily ascertain. First of all, there is the testimony of Witness Thornton from which there is an extensive quotation at page 61 of the government brief, which shows the injury resulting to the Texas ports. In addition to that quoted by the government one other excerpt from this witness is worthy of quotation:

"Taking the equalized territories where we desire a differential established, Galveston is really hurt by those rates being equalized. I cannot point out the names of the parties and the manner in which they are injured, but because of the fact that New Orleans is able to draw a large volume of traffic from the territory on and east of the Mississippi River and from the vast territory served by the barge lines at lower rates than apply to Galveston and then to reach over into Galveston's territory and draw traffic at equal rates to New Orleans as compared with Galveston, that New Orleans has been able to build up extensive steamship service and extensive movement of traffic through that port and with the superior steamship service and with the advantages that New Orleans has in other directions we cannot compete with New Orleans for the traffic which originates in our own territory on equalized rates. The port is hurt by reason of the fact that the rates are the same to Galveston

> as to New Orleans, and we are deprived. The advantages and disadvantages are not equally distributed between New Orleans and Galveston. That is clear. That is the purpose of our case." (Record 1859)

To this must be added that of Witness Hershey, who testified that the very existence of Galveston depended on the maintenance of lower rates (Government brief, page 57, Record 616, 2276); of Witness Garvin, Record 614, 615; of Witness Booth, Record 633; of Witness Bowe, Record 2415, 2416. Here is very substantial evidence from expert witnesses on behalf of the carriers which we would recite to the Court except that it is already presented at pages 57 to 64 of the government brief.

Then came witnesses for the steamship lines testifying to the difficulties caused to their operations by the equalization policy. There was Witness Torregrossa for Lykes Brothers Steamship Company, Record 1904, Witness Herrick, Lone Star Steamship Company, Record 1892; excerpts from whose testimony is quoted at pages 64 to 65 of the government brief.

Witness Frank Kell, a large grain buyer and exporter and the owner of several large flour mills in Texas and Oklahoma, testified that:

> "The rates being the same from this vast territory to New Orleans and to Galveston results in the tonnage being diminished to Galveston and increased to New Orleans to such an extent that it attracts the bottoms to New Orleans (fol. 3383) and detracts from Galveston, and we lose the advantage of the port at Galveston, by reason of the tonnage being reduced there, Galveston being on the same rate as to New Orleans, and with those other advantages that New Orleans has." (Record 2153)

This witness further testified that if the differentials were maintained the tonnage tributary to Galveston would increase sufficiently to make the sailings from Galveston as frequent as those from New Orleans, and that service would be provided to any territory they desired to reach on flour and grain. (Record 2155-56)

Witness Hogsett testified that with the same rates to New Orleans as to the Texas ports, general and miscellaneous cargoes usually go to the ships at New Orleans (Record 1931) and that if differentials were established there would be an increase in the volume of tonnage at Galveston and Houston. (Record 2004)

J. J. Hartnell, representing certain interior milling interests opposed to differentials, testified that under equalized rates practically all of their business would move to New Orleans, and that this was practically the situation at the time. (Record 708)

Further evidence to the damage to the Texas ports and the business men located there resulting from the equalized rate structure and its effect upon the movement through the port and the steamship service is found in the testimony of Witness Stockton Record 2097; Witness Daugherty, Record 2023; Witness Beveridge, Record 1912; Witness Farda, Record 2017; Witness Rhett, Record 470; Witness Talley, Record 519; Witness Ermon, Record 559. The cumulative effect of this testimony is to establish beyond a reasonable doubt the part played by the equalized rate structure in the vicious circle which is injuring the Texas ports. By granting equalized rates to New Orleans, though the extent and cost of service is greater, the appellant carriers divert traffic which

would otherwise move to Galveston. This diversion operates to injure the steamship service from the Texas ports, which causes a further diversion to the material injury of the Texas ports, exporters, and importers.

The evidence to which we have referred constitutes very substantial evidence in support of the Commission's finding that the action of appellants in making rates in disregard of the extent and cost of service resulted in injury to the Texas ports. That is as far as this court is required to look.

In apparent disregard of this rule the appellants ask this court to reverse the Commission's finding because in their opinion certain other evidence in the record was contrary to that accepted by the Commission. They contend that the Commission should have accepted as conclusive the figures as to the total movement of commerce through the ports, although most of it was unrelated to this case, and would neither originate or terminate in the territory to which they desire to equalize the rates. But as the Commission recognized, the progress of the Texas ports was due to traffic from points to and from which they had the advantage of lower rates, and to certain specific commodities moving in large bulk not involved in this order. For instance the Commission points at page 3382 of the record that 93 per cent of the imports through Texas ports consisted of Mexican petroleum, and 91 per cent of the exports consisted of petroleum, sulphur, cotton and grain. Petroleum has been exempted from the findings in this case on the ground that no substantial injury resulted to the Texas ports. As petroleum moves in tankers, it is plain that this movement has no relation to the main-

tenance of general cargo steamship service. The same is true of sulphur. Neither cotton nor sulphur are involved in this proceeding but undoubtedly the lower rates existing to the Texas ports account for the movement of these commodities. Grain and its products are involved but as the Commission points out a very substantial portion of this movement, as well as that of cottonseed products moves at lower rates than to New Orleans. (Record 3382.)

Through New Orleans, on the other hand, there was a large movement of diversified commodities to a wide interior territory, and the Commission properly concluded that on the commodities involved the equalized rate structure was diverting traffic from the Texas ports. Indeed, appellants themselves argue to this effect in contending that the differentials will divert traffic to the Texas ports.

The same criticism applies to the insistence of the New Orleans intervenors at pages 56 to 57 of their brief to the effect that the Commission should have used the net tonnage of vessels cleared and entered as an index of injury.

The Commission also considered the contention raised at pages 163 to 165 of appellants brief to the effect that the failure of the Galveston traffic to increase as rapidly as that of New Orleans was due to the development of Houston and found:

> "that while a substantial portion of the difference between the percentages of increase at New Orleans and Galveston is attributable to the faster progress made by other Texas ports, particularly Houston, a large part of that difference is traceable to the more rapid increase in tonnage during the same period enjoyed by New Orleans." (Record 3384)

The Commission found and the record sustains the finding that there is no substantial movement of general cargo through the Texas ports. Witness Giessow for the New Orleans Joint Traffic Bureau, testified to this effect at page 1324 of the record. This same witness testified that there was comparatively little import business at the Texas ports other than Mexican petroleum. (Record 1296.)

Were this court to undertake to review the evidence and make its own findings we confidently assert that insofar as the commodities and territory here involved are concerned, it would reach the same conclusion of fact that the equalization of rates resulted in substantial injury to the Texas ports. Since it will not undertake this, but will merely inquire whether the Commission's finding is supported by any substantial evidence, the argument that the Commission did not give proper weight to the total tonnage of vessels entering and clearing or to the total volume of all commerce through the respective ports and to various other factors, is beside the point.

The Commission in Arriving at Its Decision Gave Consideration to the Fact That There is a Water Movement Beyond the Ports on the Traffic Involved Herein and That There Are Competitive Routes Through the Respective Ports.

While not so stated in express terms it is apparently the contention of appellants that the existence of competition between the rail-ocean route through New Orleans and that through Galveston and other Texas ports affords the carrier appellants an absolute defense to a violation of Section 3 or that

the Commission failed to give proper weight to this factor.

At page 123 of its brief the Texas & Pacific states its sixth proposition as follows:

> "Since the established legislative policy of the Congress is to promote and maintain freedom of competition in commerce, the refusal of the Commission to give consideration to the competitive nature of the traffic herein under review, and to all the circumstances and conditions attendant thereupon, including the water rates beyond the ports, is contrary to the requirements of the law."

Similarly it is stated on page 44 of the brief filed on behalf of the New Orleans Joint Traffic Bureau:

> "In entering both its 1927 and 1929 orders, the Commission acted arbitrarily, and without regard to its statutory duty, in that it failed to give consideration to the fact that competition of competing through rail-and-ocean routes, via which an equality of charges and conditions prevailed, justified the equalization of the inland rail rate factors."

It is quite plain from the above propositions as well as from the discussion thereunder that it is intended to lead the court to believe that the Commission simply refused to recognize the existence of this competition and treated "the situation merely as if it were dealing alone with the matter of domestic rates applying to and from the respective ports." (Texas & Pacific Brief, page 125)

The courts have not determined the extent to which the Commission should give consideration to the fac-

tor of ocean transportation, which is beyond the jurisdiction of the Commission, when it is dealing with the export and import rates by rail to and from the ports. In fact, there seems to be some question as to whether the Commission is required to give any consideration thereto although some expressions in the case of *Texas & Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S. 197, would seem to indicate that it is a matter which should be taken into consideration. Certainly the court does not undertake to define the weight which the Commission should give to such circumstance.

In contending that the Commission should have given controlling consideration to the rates *through* rather than to the ports, appellants are ignoring every fact of legal significance in connection with the rates and movement involved in this case:

1. The rates here involved are not joint through rates. They apply from or to the port as *origin* or *destination*. Having made delivery of the export or coastwise commodities to shipside, the obligation of the carrier ends, and for what may happen beyond that point it is in no way responsible. Similarly its obligation does not begin on import and coastwise commodities until they are delivered to it at the ports. The export commodities may, after delivery to shipside, move by water to any country of the globe at varying rates. Some will move at regular conference rates, some at distress rates, and some at tramp steamer rates, but that will not affect the rates charged, nor the service rendered by the rail carriers. There is no common control, management or arrangement for a continuous carriage or shipment.

2. No *joint through* routes are involved in this case.

The shipper must in fact make two separate contracts: one with the rail carrier for the movement between the interior point and the port, and another with the ocean carrier for the movement between the port and the foreign destination. The shipment may move by one of the many conference lines, by an independent line, or by the roaming hound of the sea, the tramp steamer, there being no sort of contract relationship between the water and land carriers in so far as the rates and movement here at issue are concerned. The commodity may remain in storage at the port for a considerable period as in the case of grain.

3. The complaining ports before the Commission are not simply way-stations desiring to have the traffic pass over their wharves and through their harbors. Exporters and importers are located primarily at the ports, and usually at only one port, so that a discrimination of the type here involved determines not only through what port a commodity shall pass but in many instances by what exporter or importer it shall be handled. The mere fact that such shippers are middlemen, does not deprive them of their rights under the Interstate Commerce Act. This Court well knows that probably a majority of the cases of local discrimination are the result of complaints of those engaged in the distribution of commerce whether foreign or domestic and whose functions are essentially those of middlemen.

4. The provisions of the Interstate Commerce Act apply only to the rail carriers transporting the commodities to and from the ports, and their duty is to maintain lawful rates for that service, not for the through service to or from the foreign destinations.

In the case of *News Syndicate Company v. New*

York Central Railroad Company, 275 U. S. 179, this Court said:

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper *from the international boundary to New York City*. Section 1(1) and (2). It was the duty of defendants in error to establish *just and reasonable rates for that service*. Sections 1(5); Sec. 6(1) and (7).

In a long line of cases the Commission has held that under the Interstate Commerce Act the ports are the destinations of export traffic, and are subject to regulation as independent factors. In the case of *Chamber of Commerce v. New York Central & H. R. R. Co.*, 24 I. C. C. 55, 74, they said:

> "It is clear that the differential agreement was originally made in an attempt to equalize the total charges on import and export traffic through the several ports, as gateways. We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic on the ocean and thus differentiate it reasonably, from domestic traffic, but the rates to and from the ports must be reasonable, must be published as independent from the ocean transportation, and are subject to all of the provisions of the act. *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C. 266; *Armour Packing Co. v. U. S.*, 209 U. S. 56."

In the *Armour Case* cited in the preceding opinion this Court said:

"Take the present case. The through rate is obtained by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier. The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, *shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment*. This construction is reinforced by the broad provisions of Sec. 6 of the act as to publishing schedules, showing rates, fares, and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission."

In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, certain shippers contended that the rates to the Gulf ports should be adjusted with relation to the water rates so that the through rates would be equalized via the various ports. The Commission said:

"We have no jurisdiction or control over ocean rates to foreign ports, and the equalization of port rates on the basis advocated by protestants would place upon the rail lines the burden of the disabilities of the several ports, arising from such causes as distance from foreign markets, difference in harbor facilities, and other conditions affecting ocean rates. No stabilization of rail rates would be possible under such an adjustment."

Regardless of the legal necessity of doing so, however, that the Commission in fact gave consideration to this factor is evidenced not only by the order entered and the reports filed, but, indeed, is expressly testified to under oath by the chief traffic official of the Texas & Pacific, who has verified the bill of complaint instituting this proceeding. The testimony referred to is found at page 932 of the record and is as follows:

> "The Commission has recognized that there is a difference in the character of the traffic as between export and domestic and that export rates are but parts of through rates, in their order in this case, by prescribing differentials to New Orleans over Galveston instead of requiring that the domestic rates to New Orleans be applied in all cases. The domestic rates on some of the commodities in the case were fixed by this Commission on a mileage scale as reasonable rates for the distances involved, so that in ordering that lower than domestic rates be published they not only recognized that the traffic was subjected to a fur- (fol. 1472) ther haul beyond the ports, but *recognition was also given to the propriety of the longer line making some concession in its charges because of the competition of shorter lines, but in this respect they failed to go as far as in prior cases.*"

In view of this admission it is difficult to see how appellant can urge that the Commission has failed to consider the existence of this rail-ocean competition; but, if this is not enough, a comparison of the differentials maintained under the domestic rates on the same commodities, as to which every other factor is the same, should be convincing. Exhibit B-17, the

last exhibit contained in Volume VI of the record, gives the distances and domestic rates from ten points on the Texas & Pacific to the ports of New Orleans, Galveston and Houston. The domestic rates shown are those recently prescribed by the Commission for general application throughout the Southwest in *Consolidated Southwestern Cases*, 123 I. C. C. 207, 139 I. C. C. 535, and while these rates are prescribed as maximum reasonable rates they are "tied up by numerous Section 3 findings which practically has the effect of making them minimum rates.'" (R. 3111, Witness Bothwell.) In that case domestic rates were prescribed on bagging and ties, green coffee, cotton fabrics, and soap,—the import and export rates on which are involved in this proceeding. The distance and differences in the domestic rates prescribed is set out below in tabular form, the points used beginning with Marshall and extending westward on the Texas & Pacific to Sweetwater.

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[1] Finding 27 at page 405 in the *Consolidated Southwestern Cases* reads:

> "27. We are of opinion and find that the undue prejudice and preference and the unjust discrimination against interstate commerce set forth in findings Nos. 1 to 11, inclusive, or any of them, can and should be removed by the establishment and maintenance, from and to the points, or within the areas, designated in said findings, of interstate and intrastate rates which on the classes or on individual commodities shall bear the same percentage relations to one another as those reflected in the respective maximum reasonable rates prescribed or approved in findings No. 11 and Nos. 16 to 26, inclusive, which rates, from and to the points, or within the areas, found to be unduly prejudiced shall be subject to commodity descriptions not less favorable, and to carload minimum weights not higher, than those maintained from and to the points, or within the areas, found to be unduly preferred: *Provided*, That nothing in this finding contained shall prevent the application of lower rates on particular commodities from and to particular points, with our approval, upon application and showing of special circumstances and conditions."

	DISTANCES			DIFFERENCE IN DOMESTIC RATES (CENTS)					
				Bagging and Ties		Green Coffee–Soap		Cotton Fabrics	
	New Orleans	Galveston	Houston	New Orleans over Galveston	Houston	New Orleans over Galveston	Houston	New Orleans over Galveston	Houston
	(miles)								
Marshall*	338	294	245	6	9	8	12	17	24
Forney	465	308	260	15	19	20	25	38	49
Terrell	454	296	248	10	13	13	17	27	34
Dallas	489	290	242	16	19	21	25	42	49
Ft. Worth	520	307	259	15	19	20	25	38	49
Honey Grove	478	369	321	11	14	15	18	29	35
Denton	526	328	280	14	18	18	23	35	45
Cisco	635	381	334	16	20	21	26	41	51
Abilene	681	426	378	14	17	19	23	36	45
Sweetwater	722	456	408	13	15	18	20	34	38

*No differential is required to Marshall.

The foregoing table shows that the Commission has accorded effective recognition to the existence of additional factors affecting the export and import movement. Whereas under the domestic rates it has fixed a difference of 6 cents on bagging and ties from New Orleans to Marshall over Galveston and 9 cents over Houston, it permits the Texas & Pacific to equalize the import rates. When it comes to Forney, where the domestic differences as 15 and 19 cents on bagging and ties, it permits a reduction to 6 cents, or 9 cents and 10 cents respectively less than the domestic differences prescribed by it as reasonable. It permits reduction of domestic differences ranging from 13 to 21 cents over Galveston and 17 to 26 cents over Houston to 9 cents on green coffee and 6 cents on soap. On cotton fabrics differences ranging from 27 to 42 cents over Galveston and 34 to 49 cents over Houston are reduced to 12 cents.

Similar relationship exists between the differentials of 6 cents prescribed on cottonseed oil and 5 cents prescribed on cake and meal and the differences under the uniform domestic rates on those commodities prescribed in Docket 14150, *Oklahoma Corporation Commission v. A. & S. Ry. Co.*, 98 I. C. C. 183.

There is therefore conclusive evidence in the record that the Commission gave material consideration to the factors that appellant set out.

Since its decisions in this case the Commission has prescribed a general revision of the rates on grain as we have heretofore pointed out. If it is kept in mind that the carriers are attacking the rates prescribed in the *Grain Case*, 164 I. C. C. 619, on the ground that they are too low, the differences between

these rates for the distances to the respective ports compared to the differentials attacked here afford cogent evidence that the Commission gave full consideration to the competitive features urged by appellants. From Ft. Worth, for instance, which as the preceding table shows is 520 miles to New Orleans and 307 miles, or 213 miles less to Galveston, a rate of 28.5 cents is prescribed to New Orleans and 20 cents to Galveston. This difference is 8.5 cents compared to the differential of 2 cents. In other words, though a reasonable rate would be 28.5 cents the Texas & Pacific is given permission to reduce this to 22 cents or 77 per cent of the domestic rate prescribed, in order to meet the competition via the Texas ports.

That the Commission carefully weighed and considered the evidence regarding the competition via the different ports and the fact that the rail rate was only a portion of the through transportation charge is further demonstrated by the language of its various reports.

In its second report in discussing the contention of the Texas & Pacific that, in determining whether port equalization was proper, the aggregate through rates, including the rail rates to the ports and the ocean rates to the foreign points were determinative, the Commission held the contention without merit, but said (R. 3405):

> "This does not mean, however, that the fact that a port is not the origin or destination of traffic passing through it is not entitled to consideration in countenancing greater disregard of distance in import, export, or coastwise rates than in corresponding domestic rates."

That it received substantial consideration is shown by the rates cited above.

Further support is found in its opinion at page 3391 of the record where it said:

> "A port is neither the destination nor the origin of traffic passing through it. It levies toll on the traffic, in substantially the same manner as do common carriers, in its charges for use of its facilities in the transfer of traffic between the rail and wa[illegible] carriers. Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade. Such a policy also encourages waste in rail transportation."

That it thoroughly considered the question of competition is shown by its language in the second report where it said (R. 3404):

> "But another principle, equally well settled, is that a carrier may meet competition so long as it is not guilty of undue prejudice, does not charge rates which are so low as to burden other traffic, and does not contravene the declared policy of Congress to foster and preserve in full vigor both rail and water transportation * * *. But, as indicated above, there are limits beyond which a carrier may not go, even in meeting competition."

In its findings in the 1927 report it further stated (R. 3415):

> "We find that * * * the competition relied upon by defendants herein is no justification for the resulting prejudice from and to the interior points referred to."

Every suggested factor bearing upon the competition of the New Orleans and Texas lines was considered, including the effect of the prescribed differentials on the traffic and revenues of the respective carriers.

It being conclusively established that there is no factual support for the contention that the Commission failed to consider the evidence regarding competition and the fact that the rail rate was but a part of the total transportation charge, most of the argument of appellants is purely academic since it is well established that this court will not attempt to substitute its judgment for that of the Commission in determining the weight to be given to the various factors. *United States v. Illinois Central Ry. Co.*, 263 U. S. 515.

In that same case this Court dismissed the contention that competition or the desire of a carrier to retain or develop traffic afforded an absolute defense to the charge of undue prejudice. It said:

> "*Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. How much weight shall be given to each must necessarily be left to it.* The Commission found, among other things that the cost of the service from Knoxo was not greater than the cost of the transporta-

tion from many other points which enjoyed the lower rate; that the value of the service was the same; and that other traffic conditions incident to shipment from Knoxo were so similar to those of shipments from other points enjoying a lower rate that the prejudice to which the Swift Lumber Company had been subjected was undue and unreasonable. The *innocent character of the discrimination practiced* by the Illinois Central *was not established as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic.* These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 218, 220; 40 L. Ed. 940, 947; 5 Inters. Com. Rep. 405; 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144, 167, 175; 42 L. Ed. 414, 423, 426; 18 Sup. Ct. Rep. 45. In view of the policy and provisions of that statute, *the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore.* For now, the interests of the individual carrier must yield in many respects to the public need (Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case (Akron, C. & Y. R. Co. v. United States), 261 U. S. 184, 67 L. Ed. 605, 43 Sup. Ct. Rep. 270), and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were

theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate making. See Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 554; 56 L. Ed. 308, 314; 32 Sup. Ct. Rep. 108. *It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo to undue prejudice. The judgment so exercised, being supported by ample evidence, is conclusive.*" (Italics ours.)

The same rule must necessarily be applied to that other factor upon which the appellants place so much stress, namely, the ocean rates beyond the ports which together with the rail factor make up the total transportation charge. Certainly the evidence bearing upon these rates and circumstances should be and was, considered by the Commission, but they do not as a matter of law outweigh every other factor presented to the Commission. This court has never gone further than to say that the Commission should consider the various factors.

Considerable reliance is apparently placed by appellants upon the *Import Rate Case* (*Texas & Pacific Ry. Co. v. Interstate Commerce Commission*), 162 U. S. 197, but that case can be properly cited only on the proposition that the Commission must consider all relevant factors, including those beyond the ports as well within the United States. The primary basis for the decision is undoubtedly found on page 217 of the report where this court said:

"The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commis-

> sion to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions' as they are directed in the Act to consider. The Commission thought it was *constrained* by the Act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination' within the meaning of the act.
>
> "In so construing the Act, we think the Commission erred."

The court then points out that the Commission is to consider all the facts of the given case including the welfare of the common carriers, of the consumers and recipients of the merchandise, the shippers and merchants at the ports, and the general interest of the public.

In that very case it should be noted that the circuit court of appeals, finding that the disparity between the domestic and import rates was too great to be justified by ocean competition, held the order of the Commission valid.[1] This court reversed that holding saying:

> "The defendant was entitled to have its defense considered, in the first instance at least by the Commission, under a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions

[1] This view of the Circuit Court of Appeals and the action of this Court thereon defeats the assumption on page 46 of the brief on behalf of the New Orleans Joint Traffic Bureau to the effect that this Court approved the wide differentials there maintained.

> whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."

It is evident that the circuit court of appeals thought that the disparity of rates was too great to be justified even if ocean competition were considered and that the order of the Commission was therefore proper; but this court held, and has consistently followed its holding, that only the Commission is authorized to pass upon such questions after it has considered all the relevant factors. This position is very different from that urged by appellants, that ocean competition is a determining factor.

Had it considered competition and the ocean factor conclusive on the Commission this court would have so stated instead of holding that these were factors to be considered by the Commission.

It is interesting to consider the situation which would result should the rule be established that in considering discrimination between the ports the ocean factor of which the Commission has no control, must be given determining influence, so that if the ocean rates from the ports are equal, the carrier is protected in equalizing the rail rates.

The chaotic conditions of ocean rates is well known. True, the Commission says in its second report:

> "The *maximum* ocean rates are fixed by the Gulf Shipping Conference and, except on so-called distress shipments, particularly on grain, are generally the same coastwise and foreign from and to all gulf ports."

It is to be noted that the above statement refers to maximum rates and obviously only to members of the Gulf Shipping Conference. Even here the existence of distress shipments at lower rates is recognized and the record firmly establishes the importance of the ocean tramp, with its varying rates, as a factor in the fixing of actual rates.

Hon. Huey P. Long, whose testimony herein eloquently portrays the advantages of the Port of New Orleans, emphasizes the importance of the tramp steamer in the making of rates:

> "* * * In the final analysis, there are a great many rates that are dependent upon the tramp steamer traffic. By 'tramp steamer', I mean a ship which has no particular routing. It is available for hire for whoever wants to hire it. As an example, we will say that the Steele Steamship Line today might have tonnage for the West Indies. They would be wanting to look for a tramp steamer. Any shipper who did not have a ship of its own, wherever it had cargo, it would hire a steamer, and that tramp steamer would be available to carry it to the West Indies, or any place it would have cargo to move. Now, tramp steamers can come to New Orleans. Tramp steamers can come to New Orleans for two reasons. First, there is a large territory for export traffic; and second, there is a large territory for (fol. 1384) import traffic. A tramp steamer can sail into the Port of New Orleans feeling that there is a reasonable chance to receive cargo

moving either way. It cannot go into Galveston with any such expectation, or with any reliable assurance that it is going to obtain there either inbound or outbound cargo, and I firmly believe that the tramp steamer is one of the greatest rate regulating factors that we have in this country.' (R. 872)

"The tramp steamer service at New Orleans is a great service. It is really the rate regulating factor of all service. The tramp steamer is, after all, the most potent factor in foreign commerce that we really have, outside of these regular lines, and for this reason: They might for instance, sail between Mexico City and Brazil, or else between Brazil and Spain and never come to the United States. They are available for hire I might say, it is kind of like floating labor. They don't belong to the Union." (Record 876)

"* * * Therefore you find tramp steamers here in New Orleans ready to be hired and to be sent wherever there might be cargo available. It is possible for tramp steamers to make lower rates than the regular lines make. I do not doubt but that they act as a great factor in the reduction of rates. (R. 877)

"* * * Beyond question in my judgment Galveston could not get as favorable a bidding for traffic from these return boats and tramp boats as New Orleans because they did not have as many of them and because there was not as much general offering * * *." (R. 878)

"Galveston cannot get just as cheap service as New Orleans because Galveston has not got anything moving in there, and never did have. They don't attract the tramp boat regular, irregular or direct or anything else." (Record 879)

The importance of the tramp steamer in determining ocean rates is also portrayed in the testimony of Witness Thornton:

"Adding together the rail rate to the port and the steamship rate beyond, and with the exception of the tramp steamers which operate out of both ports, the total through charge today is not the same in all cases. As an exception, quite often New Orleans offers a lot of distress room more often than at Galveston because of the tramp steamers. When the tramp steamers break the rate at New Orleans the regular liners will meet that rate. It is the same at Galveston except that we do not have the tramp competition at Galveston that they do at New Orleans. Leaving out of consideration the tramps, the aggregate charge is not the same to every destination point coastwise or foreign through Galveston as through New Orleans to the same interior points." (Record 1873)

It would be impossible to make the rail rates to the ports on the basis of the rates enjoyed by the particular shipments beyond the ports, when those rates depend on the unregulated and varying charges of tramp steamers, which is in fact the situation.

The situation was pointed out by the Court in *Armour Packing Company v. United States*, 209 U. S. 56, 68, as follows:

"The ocean rate is variable, depending upon the season, weather, and other matters. The steamship must sail at a given date and has a certain amount of space to be filled, so that space may be at one time quoted to one person at one price and at another time to another person at a different price. The question of such rates varies from hour to hour, as well as from day to day. For these, among other reasons, there was no contract agreement or traffic arrangements between the railroads and export steamship lines."

It is equally apparent that the shipper who could afford to hire a whole ship would be in a much better position than the individuals compelled to use the regular lines which on the through rate basis would work an effective discrimination.

Participation by the Appellant Carriers in the Prejudicial and Preferential Rates for the Transportation in Export, Import and Coastwise Movement Affords a Sufficient Legal Basis for the Order Directing Them to Remove the Undue Prejudice and Preference.

The fundamental basis for the order of the Commission is the participation of the appellant carriers in the export, import and coastwise rates and the movement of the specified commodities thereunder to the respective ports. This participation in both rates and the movement thereunder to the Texas ports is established by the findings of the Commission which in turn are supported by substantial evidence.

In its third report at page 3452 of the record the Commission finds:

> "The New Orleans carriers participate in a full line of joint commodity rates to and from Gulf ports from and to both the junction and local points on their lines."

This finding is sustained by the testimony of the chief traffic official of the Texas & Pacific at page 974 of the record:

> "Our line carried through joint rates on the commodities involved in this proceeding from points on our line to the Texas gulf ports via the

International Great Northern. *There is a substantial portion of our export traffic routed via the lines of the Texas ports railroad, including the International-Great Northern.* There is necessarily some difference in our situation with the International-Great Northern, as far as policy is concerned, as compared to the other connections that go to Gulf ports, *because we operate through train schedules* with the International-Great Northern, whereas we do not with other connections. We operate through freight train schedules with (fol. 1537) the International-Great Northern from Longview Junction and Fort Worth."

That the Texas & Pacific participates in the joint through rates to Texas ports is further supported by the testimony of the traffic manager of the Gulf Colorado & Santa Fe who testified that the Texas & Pacific Railway in conjunction with its connections maintained a complete line of joint through rates from points on its line to Galveston, Houston, and Texas City. (Record 3255, 3256) The testimony of Witness Sparkes (Record 3146) is to the same effect.

The record also shows that the Texas & Pacific moves traffic to the Texas ports in export, import and coastwise commerce. Exhibit No. A-37 at page 961 of the record shows that it participated in the movement of 19,082 tons of cottonseed products to the Texas ports. Exhibit B 58 at page 3194 shows a movement via the Texas & Pacific of 318 tons of export grain, 873 tons of cottonseed oil in coastwise movement, 353 tons of import bagging and ties, and 593 tons of export cottonseed cake from or to points on the Texas & Pacific west of Paris & Big Sandy.

It is expressly stated by the Texas & Pacific at

page 83 of its brief that the great volume of its foreign and coastwise traffic originates at the junction points on its lines and doubtless it does not wish to forego its participation in this traffic to the Texas ports on the export, import or coastwise rates for fear of the slight competitive disability which would thus arise.

Under the terms of the Commission's order the appellant carriers have the alternative of complying therewith by raising their rates to New Orleans or by withdrawing from their participation in the transportation of the commodities involved to the Texas ports in import, export or coastwise movement.

In the briefs for the various appellants considerable capital is made of the fact that neither the Texas & Pacific nor the Louisiana Railway & Navigation Company are able to comply with the order of the Interstate Commerce Commission by reducing the rates to the Gulf ports, without the concurrence of some line serving the Texas ports. The orders of the Commission directed the defendants only "*according as they participate in the transportation* * * *" to abstain from publishing, demanding or collecting, for the transportation in export, or coastwise movement," rates reflecting a different relationship from that prescribed, and "*according as they participate in the transportation* * * *" to establish, maintain and apply, for the transportation in import, export and coastwise movement * * * rates which are less by the prescribed differentials than the corresponding rates contemporaneously maintained from or to shipside at New Orleans. (Record 174-6; Record 185-7)

Both the 1927 and 1929 orders are limited to apply

to defendants "according as they participate in the transportation." The appellant carriers are not required by any orders of the Commission to participate in the transportation in export, import or coastwise movement of the commodities involved. They could simply withdraw from the joint through routes and rates to the Texas ports. They are required to maintain certain domestic rates to those ports which are in most cases identical with the export and import rates except for the handling charges at the ports, (Witness Lynch, Record 3207), and which are not affected by the findings of undue prejudice and preferences. The truth is they prefer to raise the rates to New Orleans rather than to place their routes to the Texas ports under the slight disability which would result from the handling charges at the port. They desire to maintain the competitive advantage which their equalized rates to New Orleans give without laboring under the disability under which withdrawal from the export and import rates would place them in competing for traffic to the Texas ports.

In this connection the answer to the inquiries made at pages 112 and 113 of the brief for the New Orleans Joint Traffic Bureau may well be stated as follows:

The Santa Fe has already complied with the orders of the Interstate Commerce Commission. It has "according as it participates in the transportation" established the relationship required by the Commission to the respective ports of New Orleans and Galveston. The Santa Fe cannot elect to have the Texas & Pacific raise its local rates, but it can withdraw from participation in joint through rates to New Orleans which violate the order of the Commission. The Texas & Pacific is in the same position. It cannot compel the

Santa Fe to reduce its rates to the Texas ports but it can withdraw from participation in import, export and coastwise through rates to the Texas ports which violate the order of the Commission, or it can raise its own rates to the level prescribed. While in *Central Railroad of New Jersey v. United States*, 257 U. S. 247, it found Section 3 an improper remedy for the connection of a purely local discrimination, this Court recognized that a carrier could relieve itself from the charge of violating Section 3 by withdrawal from the joint rates, although its participation in the rates had nothing to do with the discrimination.

As a matter of fact appellants are going to considerable pains to establish that, confronted by the alternative of raising the rates to New Orleans or withdrawing from participation in joint through rates to the Texas ports, the appellant carriers prefer to raise the rates to New Orleans. (See page 8 of New Orleans Joint Traffic Bureau Brief.) This lends confirmation to the view of Witness Sparkes for the appellee carriers at page 3145 of the record that as long as the Texas & Pacific knew it would have to observe a differential over Galveston, they would prefer to adjust the rates by adding the differential to the Galveston rate to get the rate to New Orleans.

The above statement also answers the inquiry regarding the action which the Commission might take to compel obedience to its order. Each carrier could be required to make the necessary adjustment of its rates "according as it participated in the transportation" and that is what the respective carriers have done. We might also submit that the action of the Texas & Pacific in seeking to enjoin the order rather than leaving it to the Commission to compel its obedience

thereto indicates its answer to the above inquiry. The order of the Commission does not say to the Texas & Pacific "you raise your rates to New Orleans, unless the Santa Fe kindly consents to lower its rates to Galveston." It says: "You are participating in rates for the transportation in export, import, coastwise movement to New Orleans and to Galveston the relationship between which results in unjust discrimination. Such discrimination must be removed according as you participate in the transportation." The construction contended for by appellants is not in accord with the terms of the order, and, moreover, it is well settled that the court will not adopt a construction of an order which might render it a nullity if another construction will uphold it. *State of Florida v. United States*, 30 Fed. (2d) 116, 121.

The order in this case does not require appellants to maintain joint export and import rates to and from the Texas port, nor is there any outstanding order of the Commission requiring the appellant carriers to participate in joint through routes or rates on the import and export commodities to the Texas ports. While as pointed out in the *Central Railroad of New Jersey v. United States*, 257 U. S. 247, Section 1, paragraph 4 of the Interstate Commerce Act makes it a general duty of the carriers to establish through routes and just and reasonable rates there is no statutory requirement that they maintain joint *export, import, and coastwise rates* to the Texas ports in addition to the domestic rates and routes found to be reasonable by the Commission. In the absence of an order of the Commission requiring them to participate in joint import, export, and coastwise

rates to the Texas ports, the appellant carriers are free to withdraw at any time, and as we have previously pointed out the routes would still be open for movement at reasonable domestic rates fixed by the Commission in other proceedings and not here involved.

Even though appellant carriers did not have it within their power to avoid the charge of violating Section 3 by withdrawal from participation in export, import and coastwise rates and movement to the Texas ports, this would not render the order of the Commission a nullity. The Commission is empowered to prescribe the precise method of removing a discrimination; and, while as a usual matter it leaves the carriers free to adopt either the plan of raising the preferential rate or lowering the prejudicial rate, if the carriers were unable to agree as to the method to be adopted, the question would undoubtedly have been referred back to the Commission for determination. That is precisely what happened in the case of *Alexander Sprunt & Son v. United States*, 281 U. S. 249, 258. In this case, however, the question is largely academic since the carriers have reached an agreement as to the method of meeting the Commission's order, and the rates are now in effect.

The contention that the appellant carriers, acting alone, must be able to control both the preferential and the prejudicial rate has been rejected by this court in several cases. Appellants rely chiefly on the *Central Railroad of New Jersey case, supra*, but this court has itself defined its holding in that case so as to distinguish the present case therefrom. In *Chicago I. & L. Ry. Co. v. United States*, 270 U. S. 287, 293, and in *United States v. Illinois Central*, 263 U. S.

515, 520, it was pointed out that the sole ground for denial of the relief sought in the Central case was that the Central did not participate in the service which alone caused the discrimination, that service being an item in a local tariff granted without the concurrence of the Central. Here it is the joint rates participated in by appellants which are discriminatory and the Texas & Pacific has it in its power to remove the discrimination.

The law upon this subject is adequately dealt with in the brief filed on behalf of the United States and the Commission, pages 75 to 84, and will not, therefore, be further discussed herein.

The Order of the Commission is Not An Attempt to Regulate Commercial Conditions or to Counteract the Natural Advantages of New Orleans.

It is settled law that the Commission is not empowered to regulate commercial conditions under the guise of rate regulation; but in the face of this record, to contend that the Commission has attempted to do so resolves itself into the absurd proposition that if there is any evidence that the preferred port has any commercial or natural advantages, the Commission has no authority to require carriers to observe the transportation standard, but must leave it undisturbed, to enjoy not only the commercial and natural advantages which it possesses but *the artificial advantage resulting from preferential rates*. The mere statement of such a contention is sufficient to rebut it; and yet as we have pointed out above, the Commission has found, that in addition to its natural and commercial advantages, appellant carriers are according New Orleans an unlawful transportation ad-

vantage in entire disregard of the extent and cost of service given. We have further shown that this finding is supported by substantial evidence.

In its various reports the Commission sets out at length the commercial and natural advantages of the respective ports, and reaches the conclusion that the commercial advantages of New Orleans are far superior to those of the Texas ports. Appellants seize upon this language to show that the Commission is attempting to regulate commercial conditions, and to divert the traffic from New Orleans to Galveston by off-setting rate advantages.

It is plain that the evidence regarding respective commercial advantages was considered for two purposes:

First, did the action of the carriers in ignoring the greater extent and cost of service afforded New Orleans result in substantial injury to the Texas ports; and,

Second, was the equalization of rates, in entire disregard of the greater extent and cost of service, necessary to enable the appellant carriers and New Orleans to compete for the traffic involved?

Obviously, if the action of the appellant carriers in establishing equal and lower rates to New Orleans did not result in any injury to the Texas ports, the preference was not undue; but the Commission found, and the evidence supports the finding, that the commercial advantages of New Orleans were so far superior to those of the Texas ports, that if the rates were equalized in disregard of the extent and cost of service, the traffic *was diverted to New Orleans to the detriment of the Texas ports.*[1] The discussion in

[1] For further discussion of this question of injury, see page 21.

the second report regarding petroleum and its exemption from the finding of substantial injury shows that this was the purpose of relating and considering the evidence in question. The Commission reached the conclusion that on the commodities specified the carriers had gone too far in disregarding the transportation standard, and should observe it a little more closely.

These intervenors contended before the Commission that the difference in service and cost justified materially higher differentials than those prescribed, but, in spite of these contentions, it is plain from the record that the Commission did not attempt to require a full observance of the transportation standard, but made material concessions to the desire of appellants to compete for the business. In other words, it reached the conclusion, with regard to the second point stated above, that the contention of the New Orleans carriers that competition compelled them to equalize the rates if they desired to handle any of the traffic (Record 1002) was not in fact the case, because even under a proper differential system the port of New Orleans would be able to *compete* for the traffic, but not to divert virtually the entire movement as was being done under the equalized rates.

Over the strenuous objection of these parties the Commission in its second report materially reduced the prescribed differentials. The only explanation of this action is found in the following paragraph from its report:

> "The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials in most of the commod-

ities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans. On several of the commodities, however, green coffee, for instance, the movement that would be diverted from New Orleans would probably be small. The establishment of differentials would seem more certain to divert from New Orleans practically all of the movement of grain and grain products and petroleum and petroleum products originating in differential territory than any of the other commodities." (Record 3388)

Apparently, in order to enable the Texas & Pacific to compete for the grain in question and to avoid diversion of the entire movement (Record 3387) the Commission reduced the prescribed differentials from 5 to 2 cents from Texas; from 3 to 1 cents from Kansas, and from 4 to 1 and 2 cents from Oklahoma. It eliminated petroleum and its products entirely from its findings of undue prejudice and cut down the differentials on cottonseed cake and meal, cottonseed oil, packing house products, soap, and bagging and ties. It retained the differential of 9 cents on green coffee only a small part of which it stated would be diverted.

Having substantially reduced the differentials, the Commission then found, in answer to the second inquiry that "the competition relied upon by defendants herein is no justification for the resulting prejudice." In effect, this means that competition justified the disregard of service and cost in so far as it was necessary to enable the New Orleans carriers to compete for the traffic but not to the extent of diverting all the traffic to New Orleans.

It is respectfully submitted that for the purpose of passing upon the above questions, the Commission was constrained to consider the commercial advantages of New Orleans, and that before it could counteract those advantages, it would have been compelled, first, to require a strict observance of the extent and cost of service as in the case of the domestic rates; and then, to offset the commercial advantages of New Orleans, to add an additional amount to the rates justified by the transportation standard. Instead, it has permitted the appellants to depart from the transportation standard where no substantial injury resulted to the Texas ports and where such departure was necessary to enable New Orleans carriers and shippers to compete fairly for the traffic in the commodities involved.

The Fact That the Commission May Reach a Different Conclusion With Respect to Equalization of Rates on One Commodity To and From the Competing Ports Than It Reaches With Respect to Some Other Commodity Does Not of Itself Warrant the Court in Substituting Its Judgment for That of the Commission.

In the briefs of appellants and the New Orleans interests considerable capital is made of the fact that the Commission in the proceeding below found that the equalization of the rates on refined petroleum and its products moving from points in North Texas and Oklahoma to the respective ports for export was not unlawful under Section 3 whereas similar equalization of rates on other commodities was found to be unlawful. In the first place, neither the Commission nor

the courts have ever held that identical treatment must be given the rate adjustments on all commodities. The conditions of transportation and conditions of competition in the commerce as well as considerations of what the traffic will bear must all be considered as they apply to the transportation of a particular commodity. The citation by appellants of the action of the Commission with respect to petroleum products is the most effective answer to their allegation that the Commission has acted arbitrarily. The Commission was considering what constitutes undue preference or unjust discrimination. It is too well recognized to require citation of authority that a mere difference in rates or service does not constitute a violation of the statute. There must be competitive communities or competitive shippers or groups of shippers and there must be facilities for the handling of such traffic in order that there may be a substantial competition.

The investigation made by the Commission in this case went very thoroughly into the facilities at the respective ports and the uses to which such facilities were adapted. The evidence also shows whether or not there was an actual competition with respect to the several commodities involved. Whether or not there was competition on some other commodities was immaterial. In the case of grain the Commission found that there were large handling facilities at three of the Texas ports and at New Orleans. (R. 3386) It also found that there were merchants at the respective ports utilizing such facilities and purchasing grain in the differential territory in competition with each other and that interior shippers were engaged in similar competition (R. 3392-3395).

When it came to the consideration of petroleum products the Commission found a situation where there were large refining companies operating refineries at the Texas ports receiving their crude oil largely by pipe line from the interior oil fields in Texas and Oklahoma. These particular refineries have their own private export facilities which are not open to exporters of refined petroleum products from the interior. The interior refineries have a large surplus production and must ship it by rail to tidewater for export in competition with the coastal refineries. All of this is set forth in the decision (R. 3398) where it is also stated that only one of the major refining companies operating at the Texas ports appeared at the further hearing and that it made no showing that the present adjustment had operated to its injury. The following excerpt from the Commission's decision as set forth in Record 3398-9, clearly indicates the basic distinction between the situation as to petroleum and that as depicted with respect to the other commodities involved:

> "These interior refiners must ship their surplus of refined petroleum by rail to tidewater for export, and in doing so they come into keen competition with the large coastal refiners. The Texas port refiners, by reason of the cheaper pipe-line transportation of the crude, now have it within their power to force the interior refiners out of the export market. An increase in the export rate to the Louisiana ports, the only ports through which the interior refiner now has access to the export market, it is testified would remove the interior refiner from that market (fol. 520lk-26). Refiners in the interior are scattered over a wide area in the mid-continent field of Kansas and Oklahoma and over

the major portion of Texas. Tulsa is generally considered the center of the mid-continent field. The principal interior refiner protesting against disruption of port equalization is located at Tulsa in what would remain equalized territory under the original decision. The situation with respect to this refiner is substantially similar to that of other refiners in the mid-continent field. Its principal product is gasoline. It has no means of transporting its refined products to the domestic or export markets except by rail, and has no means of reaching the export markets with its refined products, a large portion of which consists of gasoline, except through the independent exporters whose facilities are at the Louisiana ports. No such facilities of independent exporters exist at the Texas ports and, because of the fact that the large coastal refiners served by pipe lines are located at those ports, it is doubtful if differentials were established whether any such facilities would become available there. Therefore, any reduction in the rate to the Texas ports without a corresponding reduction to the Louisiana ports could be of no benefit to the interior independent refiner and would result in benefit only to the Texas coastal refiners, in that it would enable them to secure most, if not all, of the export business now handled by the independent refiners through the Louisiana ports."

The adjustment of rates on petroleum products was, moreover, somewhat different from that on the other commodities being considered. There was a system of very broad groups of rates on export petroleum which according to all of those who testified properly suited the peculiarities of that traffic. Also, some of the important producing areas were routed along the border line of the differential territory,

some on one side and some on the other of such line so that the average weighted difference in distance to the respective ports was not so great. Apparently, however, the controlling feature was the absence of any substantial competition. There were large private facilities at the Texas ports but the representatives of the companies operating these facilities there favored the continuance of the policy of equalization or made no opposition thereto. In other words, those principally interested in the transportation of the commodity were with a few minor exceptions in favor of the continuance of such policy and one of their reasons given for such position was the absence of sufficient facilities at the Texas ports.

All of this demonstrates that the Commission was carefully considering the conditions surrounding the commerce in each of the several commodities. The fact that it gave relatively higher differentials in the case of some commodities than it did in others was further evidence of the exercise of a considerate judgment dealing with the differences in the conditions pertaining to the several commodities. When upon further investigation the Commission felt that the competitive conditions in the commerce of this commodity were such that differentials of this character would be too high in that they would tend to shut the traffic out from New Orleans entirely, it exercised its judgment based upon a large mass of testimony, much of which was conflicting, in reducing such differentials, first, by restricting the differential territory and second, by reducing the differentials in nearly all cases.

Bearing upon the same contention the appellants cite a recent decision of the Commission where it

was dealing with the import rates on blackstrap molasses from New Orleans to destinations in Oklahoma and Kansas where the carriers were proposing to equalize such rates with those applying from the Texas ports, the proceeding being I. & S. Docket 2439, *Blackstrap Molasses from Louisiana Ports to Kansas and Oklahoma*, 171 I. C. C. 591. In that case the Commission again went into the question as to whether or not there was a substantial competition at the Texas ports with respect to this commodity and found that the commodity was customarily handled from tank steamers into storage tanks and that such facilities were necessary for the handling of the commerce in substantial quantities. It also found that there were no existing facilities adapted to the handling of the commodity at any of the Texas ports except at Houston where the capacity of the facilities was only about seven per cent of those located within the port limits of New Orleans and that these facilities were not sufficient to supply the demand in Texas, where Houston already had a rate advantage, and at the same time ship any considerable quantity thereof out of the state. The following excerpt from the decision gives the basic distinction between that and the situation existing in the present case:

> "Practically all of the blackstrap shipped from Houston, Texas City, and Sugar Land moves to points in Texas where, because of their advantage in rates and favorable transit arrangements on blackstrap used in the manufacture of mixed feeds, the Texas shippers are able to obtain 0.5 cent per gallon more for blackstrap than their New Orleans competitors receive. The Texas ports do not import or produce, or possess

> the facilities for handling, sufficient blackstrap to supply the demand for that commodity in Texas and at the same time ship any considerable quantity thereof out of the State." (171 I. C. C. 591, 597)

The other decision upon the same subject dealt with domestic rates and here again the Commission found that the production in Texas was insufficient to serve the local demand and therefore a difference in the rates to other states was not sufficient to warrant a finding of the violation of Section 3.

The citation to the Commission's action in the case of Blackstrap Molasses merely further illustrates that the Commission deals with each commodity according to the conditions of transportation as they affect such commodity and that in considering such conditions of transportation the competition and the facilities for conducting the competition are necessarily to be considered as they affect each particular case.

The Judgment Exercised by the Commission in Administering the Fourth Section of the Interstate Commerce Act is no Legal Ground for the Court to Enjoin Its Exercise of Judgment in Administering Section Three of the Act in the Present Case.

At pages 176 to 199 of the brief for appellants and at pages 61 to 64 of the brief for the New Orleans interests the contention is advanced that the court should enjoin the order in this case because the Commission in administering the long and short haul provisions of the Interstate Commerce Act, as set forth in Section 4 of the Act, has permitted a

longer route to meet the rate of the shorter route where the percentage of circuity is greater than the percentage where equalization is forbidden in this case. The point actually resolves itself into the contention that the judgment of the Commission as exercised in this case in administering Section 3 of the Act, which prohibits undue preference and unjust discrimination by carriers in serving competing shippers or localities, should be enjoined and set aside by the court if the Commission in administering Section 4 of the Act in some other case has exercised a judgment which would permit a long route carrier to meet the rate of a short route carrier where the excess service was proportionately greater than the Commission saw fit to permit in this case.

Here the Commission found that 25 per cent additional service could be given without any difference being made in the rates to the competing localities, namely, the ports. In administering the Fourth Section, however, the Commission has permitted carriers over indirect routes to meet the rates of carriers over direct routes where the long route is as much as 50 to 70 per cent greater than the short route. The Commission may have erred in its judgment in permitting such indirect service but whether or not it erred is no reason for the court to substitute its judgment for that of the Commission in the present case. *Virginian Ry. v. United States*, 272 U. S. 658, 666.

In the second place, the situation in administering the Fourth Section is wholly different from that involved in this case in that here the Commission is dealing with rates from a particular point of origin to separate and competing destinations, namely, the

Louisiana ports, on the one hand, and the Texas ports, on the other. These two groups constitute competing localities under the language of Section 3 of the Act and the judgment of the Commission has been invoked to determine the extent to which carriers may give greater service for the same price to one group than they do to the competing group. In administering the long and short haul clause the Commission deals with identical origins and destinations for the respective routes and in fixing a general rate level takes into consideration the reasonable tariff routes to be applied between the points in question. Since there is only one origin and one destination there can be no prejudice of one locality against another nor can there be any undue preference of shippers as the shippers may have a choice of the routes. The Commission in such case is considering only the extent to which it will permit carriers to compete with each other and the interests of the shippers or the localities cannot possibly be affected thereby.

Furthermore, the record in this case shows that there are numerous routes from the differential territory to each of the several ports, some of which are more circuitous than others and permission of the Commission in administering the Fourth Section makes it possible for the more indirect routes to compete with the direct routes to the several ports. For example, the Texas & Pacific forms a short line route from certain points on its line in differential territory while the other appellant would have a more circuitous route. On the other hand the Southern Pacific lines, (Texas & New Orleans Railroad Company) would have a still more indirect route from

such points to New Orleans, and the Rock Island Lines (The C. R. I. & G. and C. R. I. & P.) would have even more circuitous routes than the Southern Pacific. Each of these routes are applicable to New Orleans from points in the differential territory and properly so under the circuity provisions of the Commission regulation. In determining the service to New Orleans all of these routes are to be given consideration and the Commission cannot single out the short line of the Texas & Pacific or next the shortest line of the Louisiana & Arkansas and say that these are the only ones which should compete for the traffic from such points in differential territory to New Orleans. The degree of circuity to be permitted is a matter of judgment for the Commission which may have been carried to an extreme but there is no evidence in this case that there is any route to New Orleans or to the Texas ports which shows such extreme percentages of circuity in meeting the short line route. In like manner, to Texas ports the longer routes are permitted to compete with the short line routes to each of the particular ports but in either case we are dealing with the routes between one point of origin and one destination and what may be proper in such case does not necessarily govern the judgment of the Commission in determining the quantum of service that may be given upon equalized rates to competing communities and to competing shippers. In the administration of the Fourth Section the Commission has doubtless been influenced to permit a greater circuity because of the reciprocal features of such a general rule. Almost every line of railroad will be part of the indirect routes in many cases and get the benefit of the rule whereas in other cases they

may be part of the direct routes and render the minimum of service in performing the transportation. For example, the Texas & Pacific publishes joint through export rates to the Texas ports from Sweetwater, Texas via its junctions in East Texas. The direct route from Sweetwater to Galveston is via the Santa Fe. The Texas & Pacific enjoys the benefit of the circuity provision. In this case there are involved the rates on coffee from Waco, Texas via the Texas & Pacific to New Orleans whereas the direct route is via the Southern Pacific. The Texas & Pacific does not serve Waco directly but with its connections forms an indirect route and is permitted to compete in the traffic upon the same rate which the direct route charges. No such reciprocal situation exists when dealing with rates via competing routes to different destinations.

The Order Herein Was Entered in Pursuance of the Policy of the Law Directing the Commission to Protect and Preserve Commerce Through the Various Ports.

At the hearings on this case witnesses testified as to the various events which led up to the establishment of the first Texas ports. Prior to 1890 there was no port which could accommodate sea going vessels in the entire Gulf Coast from New Orleans to the Mexican border. Various shipper interests located in the Southwest became interested in the establishment of an outlet for the surplus of commerce moving to foreign countries from United States ports and as a result of this conferences were convened of persons interested in the subject, the first being held at Topeka, Kansas, in 1889. (Record 1732-4; 1739;

2156) Later another conference was held at Denver, Colorado, and the record shows the broad representation of states attending these conferences. Following the conferences a memorial was presented to Congress requesting that body to give consideration to making appropriations and establishing a deep water port on the Texas Gulf Coast. As a result of this, the Act was passed in 1890 creating the Port of Galveston and authorizing the development thereof. Later by succeeding acts of Congress ports were established and appropriations made therefor at Port Arthur, Texas, Orange, Texas, Texas City, Texas, Beaumont, Texas and Houston, Texas. This group has been generally referred to as the Texas Ports and will be so referred to in this brief. All of these ports were established prior to the adoption of the Transportation Act, 1920. Section 500 of that Act provides among other things, as follows:

> "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

The function of the Commission in fixing rates or in prescribing rate adjustments being a legislative function and the policy of the law being thus declared, the Commission is clearly under the duty of carrying out its delegated authority and exercising its jurisdiction to prevent action by carriers in depriving any of the ports of the benefit of their geographic location in contravention of the provisions of the Interstate Commerce Act and the declaration of policy as adopted by Congress.

Its duty under this provision is recognized by the decision of the court in *Chicago R. I. & P. R. Co. v. United States*, 274 U. S. 29, and was recognized by the Commission in the following language taken from its 1925 report:

> "In section 500 of the transportation act, 1920, it is declared to be the policy of Congress to promote, encourage, and develop water transportation service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation. Of the same tenor are the provisions of section 8 of the merchant marine act, 1920. The facilities for water transportation from or to and at Galveston cannot be preserved in full vigor under a rate adjustment which unduly favors New Orleans. It is important that all ports be kept open and in as vigorous a condition as possible so that water lines may be attracted thereto and the public given the cheapest and most efficient service, both by water and by rail. (Record 3360-61)

The Order of the Commission in Docket 20685 is Supported by Substantial Findings and Evidence, and Appellant Carriers Can Be Required to Cure the Undue Prejudice and Preference There Condemned.

The order of the Commission in Docket 20685, which required the carriers to cease and desist from charging to Waco rates on green coffee from New Orleans exceeding those charged to Dallas and Fort Worth, followed the complaint of certain of these interveners engaged in the coffee roasting business at Waco. The Commission found that these complain-

ants were compelled to pay a prejudicial rate of 57.5 cents for a haul of 518 miles while competing coffee roasters at Dallas and Ft. Worth were charged only 48.5 cents for hauls of 489 and 520 miles respectively under substantially similar conditions. (Record 3447) The fact situation depicted by the Commission presents a clear case of undue prejudice and preference, and is fully supported not only by the evidence introduced by the particular complainants but by the record in Docket 12798 which upon stipulation of counsel was made a part thereof.

The contentions advanced by the Texas & Pacific in attack upon this order are substantially the same as those raised against the order in Docket 12798. That carrier does not serve Waco with its own lines but participates in joint through import rates from New Orleans on green coffee to Waco. (Texas & Pacific Brief, page 224) Its primary contention is that, having no exclusive control of the rate to Waco, it cannot as a matter of law be guilty of undue prejudice. This legal contention is adequately dealt with at page 51 herein, and at page 75 of the government brief in connection with the 12798 order.

Perhaps we should point out in addition that counsel is mistaken in the statement that the fact situation is exactly parallel with that before the court in *Philadelphia & Reading Ry. v. United States*, 240 U. S. 334. It would be parallel had the Commission found that the maintenance of the rate of 57.5 cents to Waco from New Orleans and of 48.5 cents to Fort Worth from New Orleans discriminated against and was prejudicial to *New Orleans*; but as pointed out above the Commission found that it was

prejudicial to *Waco* and preferential of Ft. Worth and Dallas.

It is also true as pointed out at page 228 of the Texas & Pacific Brief that the extent of the prejudice has been somewhat modified as a result of the charge in the import rates from the Texas ports following the revision of the domestic rates in the *Consolidated Southwestern Cases*; but the application of those rates does not correct the undue prejudice to the extent it was found to exist by the Commission and obviously this court will not undertake to revise the judgment of the Commission on that point.

CONCLUSION.

The decree of the lower court denying the prayers for injunction and dismissing the petitions for want of equity should be affirmed.

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